83 - 1847

In The

Supreme Court of the United States

October Term, 1983

No. _____

RICHARD I, INC., d/b/a RICHARD I SCHOOL OF BEAUTY CULTURE, EJRY, INC., d/b/a RICHARD I BEAUTY SCHOOL, VIOLET CURRY and DOLORES ECTOR,

Petitioners,

-against-

GORDON AMBACH, as Commissioner of Education of the State of New York, and the Education Department of the State of New York,

Respondents.

PETITION FOR A WRIT OF CERTIORARI FOR THE NEW YORK STATE COURT OF APPEALS

Cornelius D. Murray, Esq.
Attorney for Petitioners
O'CONNELL AND ARONOWITZ, P.C.
(Peter L. Danziger and
Thomas F. Gleason Of Counsel)
100 State Street
Albany, New York 12207
(518) 462-5601

Dated:
May 11, 1984

63 pp

QUESTIONS PRESENTED

1. Whether the privacy interests of the Petitioner students were unjustifiably invaded by imposition of data gathering processes which force schools to engage in speculative and covert decisions concerning the racial, ethnic, economic and handicapping characteristics of the Petitioner students?

2. Whether Respondent's failure to renew Petitioners' licenses to operate licensed beauty schools as a result of Petitioners' good faith refusal to compile by speculative and covert means, data on the racial, ethnic, economic, and handicapping condition characteristics of the student population violated the Petitioners' rights to due process under the Fifth and Fourteenth Amendment to the United States Constitution?

3. Whether or not Respondent's imposition upon Petitioners' of covert data gathering processes without first complying with due process procedural protections violated Petitioners' rights to due process?

4. Whether Petitioners were denied due process as a result of the Respondent's decision not to renew Petitioners' licenses without providing Petitioners with an opportunity for a hearing to determine whether Petitioners could in good faith comply with the directives of the Respondent concerning data gathering procedures?

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TREATISE:

IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

No. _____

RICHARD I, INC., d/b/a RICHARD I SCHOOL OF BEAUTY CULTURE, EJRY, INC., d/b/a RICHARD I BEAUTY SCHOOL, VIOLET CURRY and DOLORES ECTOR,

Petitioners,

-against-

GORDON AMBACH, as Commissioner of Education of the State of New York, and the Education Department of the State of New York,

Respondents.

PETITION FOR A WRIT OF CERTIORARI FOR THE NEW YORK STATE COURT OF APPEALS

The Petitioners, Richard I, Inc., Ejry, Inc., Violet Curry and Dolores Ector respectfully request that a writ of certiorari issue to review the Decision and Order of the New York State Court of Appeals dated February 14, 1984. That February 14, 1984 Decision and Order affirmed an Order of the New York State Supreme Court, Third Judicial Department which had reversed an Order of the Supreme Court sitting at Special Term. The Supreme Court at Special Term, in a proceeding pursuant to Article 78 of New York's Civil Practice Law and Rules, determined that the Respondent's imposition of informational reporting

requirements concerning, *inter alia*, race, ethnic background, economic status and handicapping conditions, was arbitrary, capricious and violative of Petitioners' privacy and due process rights.

OPINIONS BELOW

The opinion of the Court of Appeals appears in the Appendix hereto at p. A1 (see 62 N.Y.2d 784 __ NYS2nd __). The opinion of the Appellate Division, Third Department appears in the Appendix at A2-A4 (see 90 A.D.2d 127, 457 NYS2nd 583). The opinion of the Supreme Court at Special Term appears in the Appendix at pp. A5-A9 (see 109 Misc.2d 893, 441 NYS2nd 352).

JURISDICTION

The date of the Order sought to be reviewed by this Petition is February 14, 1984. Jurisdiction is conferred on this Court pursuant to subsection 2 of 28 U.S.C. section 1257.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fifth Amendment to the United States Constitution provides in pertinent part:

> No person...shall be deprived of life, liberty or property without due process of law. . .

The Fourteenth Amendment to the United States Constitution provides in pertinent part:

> . . .nor shall any state deprive any person of life, liberty, or property, without due process of law . . . .

Subdivision one of section 5001 of New York's Education Law provides:

> 1. Schools required to be licensed. No private school which charges tuition or fees for instruction and which is not exempted hereunder shall be operated by any person or persons, firm, corporation, or private organization for the purpose of teaching or giving instruction in any subject or subjects, unless it is licensed by the education department. A private school as contemplated by this article shall be any entity offering to instruct or teach any subject by any plan or method including written. visual or audiovisual methods.

Subdivisions four and five of section 5003 of New York Education Law provide:

> 4. Disciplinary action. a. The commissioner for good cause, after affording a school an opportunity for a hearing, may take disciplinary action as hereunder provided against any school authorized to operate under this article.
>
> b. Good cause shall include, but not be limited to, any of the following:
>
> (1) fraudulent statements or representations to the department, the public or any student or enrollee, in connection with any activity of the school;
>
> (2) violation of any provision of this act or any rule of the board of regents or regulation of the commissioner;

(3) conviction of any owners, operator, director or teacher of any crime involving moral turpitude; or

(4) incompetence of any owner or operator to operate a school.

c. Disciplinary action includes a cease and desist order, mandatory direction, restriction of rights, powers or privileges, fine, penalty, suspension or revocation of an authorization to operate, or any combination of such action.

5. Hearings. The school shall be given reasonable notice of hearing, including the time, place and nature of the hearing and a statement sufficiently particular to give notice of the transactions or occurrences intended to be proved and the material elements of each cause of action. Opportunity shall be afforded to the school to respond and present evidence and argument on the issues involved in a fair hearing including the right of cross-examination. In a hearing the school shall be accorded the right to have its representative appear in person or by or with counsel or other representative. Disposition may be made in any hearing by stipulation, agreed settlement, consent order, default or other informal method. The commissioner shall, at the request of the school, furnish a copy of the transcript or any part thereof upon payment of the cost thereof. A hearing officer designated by the commissioner shall conduct the hearing and shall be empowered in connection therewith, to:

a. administer oaths and affirmations;

b. issue subpoenas in the name of the department, requiring attendance and giving of testimony by witnesses and the production of books, papers and other documentary evidence, and said subpoenas shall be regulated by the civil practice law and rules;

c. provide for the taking of depositions of witnesses;

d. regulate the course of the hearings, set the time and place for continued hearings, and fix the time for filing of briefs and other documents; and

e. direct the school to appear and confer to consider the simplification of the issues by consent. The strict legal rules of evidence shall not apply, but the decision shall be supported by substantial evidence in the record. A copy of the decision or order shall be delivered or mailed forthwith to the school or to its attorney of record at least ten days prior to the time it is to take effect.

STATEMENT OF THE CASE

Petitioners, Richard I, Inc. and Ejry, Inc. are private schools operated by New York corporations. Each offers a 1,000 hour program of instruction in beauty culture, graduation from which enables students to qualify to sit for the New York State Board Exam for licensure as a cosmetologist. Petitioners' schools are licensed by the Respondent Education Department pursuant to §5001 of the Education Law. Petitioners Violet Curry and Dolores Ector are two students at the schools who are directly affected by the State action under review.

By directive issued in a Memorandum from the Respondents to Petitioner schools and other similarly situated schools, Petitioner schools were required to submit certain informational forms. The forms were stated to be a part of the occupational education data system ("OEDS") which was to be implemented by Respondent in apparent disregard of the regulatory promulgation procedures set forth by the New York State Administrative Procedure Act.

The above-mentioned directive, *inter alia,* required submission of OEDS forms 7 and 8, which when completed would contain data on the racial/ethnic background, economic and academic disadvantagements and handicapping conditions of the schools' students. Notwithstanding that providing the data was not optional, the directive further noted that "schools cannot require students to identify their racial/ethnic background, academic or economic disadvantagements (including limited English speaking ability) or handicapping conditions". Instead, the schools were instructed to use "some sort of observational technique" to complete the forms, and to be prepared to document the procedures used.

As a matter of principle, Petitioners' schools refused to complete and submit portions of the forms in question which required compilation of data on the racial/ethnic background, economic and academic disadvantages, and handicapping conditions of the Petitioner schools' students. Petitioner schools' objections related to both the content of the forms and the manner in which the data was to be obtained. The refusal and the reasons for it were communicated to Respondents prior to any action by Respondents against Petitioners. The

Petitioner students objected to the material being compiled about them, and the manner in which it was to be compiled.

The result of Petitioner schools' refusal to complete OEDS forms 7 and 8 was the denial of Petitioner's license renewal applications, a demand that Petitioners close the schools within 60 days and, subsequently, a refusal to afford Petitioners an administrative hearing on whether good faith compliance with Respondent's directive was possible. The Respondents denied the renewal applications rather than move to revoke the Petitioner schools' licenses apparently for the reason that such a revocation would have required a hearing. See New York Education Law §5003, subds. 4 and 5. In this respect it is noteworthy that the OEDS forms were not part of the renewal applications.

As a result of the Respondent's actions, Petitioners commenced the instant proceeding pursuant to Article 78 of New York's Civil Practice Law and Rules, seeking a Judgment (1) annulling the Respondent's determination which had denied Petitioner schools applications for renewal of their licenses and ordered the schools to cease operation as licensed schools; and (2) to enjoin Respondents from requiring Petitioner schools to collect and report the data as required in OEDS forms 7 and 8. The Federal Constitutional issues sought to be reviewed were raised in paragraphs 16 through 34 of the Petition by which this preceeding was commenced. (The Petition is reproduced in the Appendix at pp. A21 through A35). By decision dated July 14, 1981, Petitioners were awarded the requested relief by a Decision of the New York State Supreme Court, sitting at Special Term.

By Order dated December 20, 1982, the Appellate

Division, Third Department reversed the Judgment of Special Term and dismissed the Petition. By Order dated and entered February 14, 1984, the Order of Appellate Division, Third Department was affirmed by the New York State Court of Appeals.

REASONS FOR GRANTING THE PETITION

RESPONDENTS' FAILURE TO RENEW PETITIONERS' LICENSES TO OPERATE LICENSED BEAUTY SCHOOLS VIOLATED PETITIONERS' CONSTITUTIONAL RIGHTS OF PRIVACY AS WELL AS PETITIONERS' RIGHTS OF DUE PROCESS UNDER THE FIFTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION

A

The Coercive Implementation of the OEDS System Violated Petitioners Constitutional Rights

Justice Brandeis, recognizing the fundamental constitutional right of privacy, wrote in dissent that the framers of the Constitution "conferred, as against the government, the right to be let alone--the most comprehensive of all rights and the most valued by civilized men." *Olmstead v. United States,* 277 U.S. 438, 478 (1928). This fundamental constitutional right also has been recognized by the Congress of the United States. See generally 5 U.S.C. §552(a); P. L. 93-579 §2(2) (4). It is clear that the Respondents in this case violated this fundamental right of Petitioner students to be let alone.

The Petitioner schools are required, through the

completion of the OEDS forms, to make the Petitioner students the subject of classifications by school personnel based on race, ethnic background, economic disadvantages, and handicapping conditions. The Petitioner schools promptly objected to being forced to participate in these violations, and it is clear that Petitioner schools have standing to raise this privacy objection of the students. *Runyon v. McCrary,* 427 U.S. 160; *Pierce v. Society of Sisters,* 268 U.S. 510.

By the terms of the OEDS directive, which was not the product of any direct statutory delegation of authority, nor the product of any duly promulgated regulation, the students could not be required to provide Petitioner schools with the information necessary to make the categorization decisions. Instead Petitioner schools were required to use covert "observational" judgments to arrive at the conclusions regarding the personal characteristics of the student body.

Respondents asserted below that these procedures would not result in individualized data being maintained for particular students, because the data was maintained for the student body as a whole, and that accordingly personal privacy rights of the students were not at issue. However, this clearly is not the case. Such a compilation entails staff conversations, speculation, and even stereotyping as to each student's race, national origin, handicap and/or economic status.

If the OEDS forms are to be fully completed, school personnel must form an opinion, based on observation, on such things as whether the individuals' origins trace back to the Indian subcontinent or a Pacific island, whether the family income of a given student is at a certain level, or whether the student is under

guardianship or has been institutionalized. No factors such as intermarriage, differing choice of life style, or similarity of outward characteristics of differing racial groups would reasonably be incorporated in the categorization process.

It is clear that the demographic data sought on the entire student body could not be compiled by observing a whole group; rather it could only be compiled from individualized observation. It is these individual observations and the conclusions based on little more than sheer speculation which the Petitioner schools do not wish to perform and which the Petitioner students find offensive to their right of privacy and their right to be free from unjustified governmental intrusion. Cf. *United States* v. *Little*, 321 F. Supp. 388.

This Court has repeatedly recognized the privacy interest of individuals to be free from unreasonable government intrusion into their private lives. See *Whalen* v. *Roe*, 429 U.S. 589; *Roe* v. *Wade*, 410 U.S. 113; *Eisenstadt* v. *Baird*, 405 U.S. 438; *Stanley* v. *Georgia*, 394 U.S. 557; *Grizwald* v. *Connecticut*, 381 U.S. 479. Here the unreasonable nature of the intrusion is clearly demonstrated by the nature of the personal data demanded (i.e. race, economic status and handicapping conditions); the speculative and statistically invalid method of compiling the data (see Paragraph B infra); and the complete absence of any procedural safeguards over the compilation process (see Paragraph C infra).

B

The OEDS System Infringes on Petitioners' Constitutional Rights to Due Process

The required collection and reporting of data on the OEDS forms, and the use of the so-called "observational technique" to acquire the information, constituted a violation of Petitioners' due process rights due to the irrational and unduly intrusive manner in which the OEDS directive was required to be executed. The OEDS forms are problematical first with respect to the method by which the desired data is to be gathered. The directive states:

> These data categories are not voluntary, however, and schools should use some sort of observational technique at the time of registration (or other appropriate time) to obtain the data needed to complete these sections of the forms.

Respondents clearly have stated that the schools cannot require students to provide the information. This leaves it to the school officials to make evaluations on each student's physical, emotional, and mental state. Thus, the Petitioners' schools must decide, based on observation, whether a student has a "serious health impairment," a "serious emotional disturbance," or perhaps an indication of "mental retardation." The employees of Petitioners' schools found themselves untrained and unable to make such personal and medical evaluations.

No standards or statistically viable techniques were offered to enable Petitioner schools to make the required judgments. Thus, the demand for such detailed data

in the context in which it was required, forced Petitioner schools to engage in speculative, irrational and personally intrusive inquiries that directly violated the constitutional privacy rights of their students. Such a procedure is constitutionally offensive to the schools based on their standing to raise the students' privacy interests, *Runyon v. McCrary,* 427 U.S. 160, and also based on the schools' due process and privacy rights not to be required to engage in morally offensive conduct unless a compelling and legitimate need for the compulsion is shown. See *West Virginia State Board of Education v. Barnette,* 319 U.S. 624.

The required categorizations on race or ethnic background are equally inexact and offensive. For example, without benefit of an ability to inquire of the students or any other rational categorizing tool, Petitioners were required to place, through covert observations, their students into one of the following categories: White, Hispanic; Black not of Hispanic origin; Black of Hispanic origin; American Indian; Alaskan; and Asian or Pacific islander.

It is clear that in order to justify government categorizations based on race or ethnic background, the categorization must withstand "strict scrutiny" and overcome an inherent suspicion of such classifications. See e.g. *Brown v. Board of Education,* 347 U.S. 483. The scrutiny should be no less strict where the government is forcing private educational institutions to do the categorizing function; particularly where, as here, the private school finds the process to be morally offensive. In this case, even a modicum of scrutiny would invalidate the OEDS system--the fact that the data thus obtained was the product of no more than sheer speculation was, in effect, admitted

by Respondents in the directive, because the data was expressly excluded by Respondent from any audit requirement.

Equally absurd was the assumed ability of the Petitioner schools to determine by observing whether students are living at or below the poverty level.

But the indicators of the irrationality of the OEDS categorization process do not stop with Respondents own admissions. For example, if it is true as Respondents argued below that the data obtained is to be used as a benchmark to determine the existence of possible discrimination, it is noteworthy that Respondents have never revealed that with which the benchmark data is to be compared. Certainly, it would be unrealistic to compare such data against general demographic characteristics of the population, because there has been no showing that such characteristics are reflected in the pool of applicants to cosmetology schools. In addition, Petitioners were never required to supply data on all applicants to their schools, but only on those who eventually were admitted. Clearly, unless the pool of applicants is compared with the pool of enrollees, no meaningful conclusion regarding discrimination can be derived. It is also important to note that no charge of discrimination ever has been leveled against Petitioners, and Respondents cannot point to any statutory authorization to use such a benchmark, instead of concrete investigation of complaints.

OEDS also is irrational because there is no likelihood that schools submitting the non-auditable OEDS data would do so in a manner incriminating themselves regarding discriminatory practices. Moreover, it is

irrationally and fundamentally offensive to place Petitioners in the position of providing data in an attempt to prove they are not engaging in discriminating practices, when they do not stand accused of discriminatory practices.

The failure of the OEDS reporting requirements to withstand any degree of scrutiny is further demonstrated by the fact that Petitioners, as unwilling agents of the State in the compilation process, have never been informed of the criteria to be applied to the data obtained, nor has there been any statutory or regulatory articulation whatsoever as to how the OEDS data is to be used. If the Petitioners are to have the data used against them as the possible targets of any allegation of discrimination, schools in Petitioners' position should certainly have the benefit of knowledge of the standards with which they must comply.

The Petitioners' schools could not, in good conscience or good faith, facilitate the use of speculative and invalid data that results from direct invasion of the privacy of their students. It is one thing to realize that speculative categorization processes are being utilized in private education by the government. It is quite another to be forced to participate in it.

Thus, this case raises important questions as to when and how the State can force a person to engage in behavior that is found by the person to be morally reprehensible. Certainly, as much as religious views, rational moral views concerning conduct mandated by the State falls within the "sphere of intellect and spirit" constitutionally protected from manipulation by the State. See *West Virginia State Board of Education*

v. *Barnette,* 319 U.S. 624, 642; Tribe, American Constitutional Law §15-5, pp. 899-900. There can be no rational distinction between a state forcing the espousal of beliefs that should be embraced only through free choice, and the state forcing conduct that is part and parcel of a belief structure that is offensive to he who is forced to act.

The record in this case makes it abundantly clear that Petitioner schools objected to the OEDS system on moral grounds and considered the OEDS system an unjustified exacerbation of the state's intrusion into the private education system. See *Pierce* v. *Society of Sisters,* 268 U.S. 510. Petitioners also clearly communicated their belief to Respondent that the type of data required should never have been collected without a clear showing of need, and establishment of procedures to ensure that personal intrusiveness was minimized. Also, the Petitioners objected that "observational" compilation of data should never have been required without a clear showing that it would result in information that would in fact be likely to fulfill the asserted purpose for which it was required. Under the OEDS, to make matters worse, such purposes never were articulated at all.

Petitioners schools' objections related to a fundamental disdain for being involuntarily used as a government agent in this covert intrusive process. Notwithstanding these deep rooted objectives, Petitioner schools were forced to comply or lose their licenses, and Petitioner schools were provided with no forum whatsoever in which to voice their objections to these impositions upon them.

C

Petitioners Were Deprived of Due Process as a Result of the Total Absence of Controls Over Procedures Utilized to Derive the Information Used in the OEDS System

In contradiction to the scheme for maintaining records of prescription drugs that was upheld in *Whalen* v. *Roe,* 429 U.S. 589 (1977) the OEDS reporting requirements cannot by any stretch of reasoning be characterized as "the product of an orderly and rational legislative decision." 429 U.S. 589, 597, supra. Instead OEDS was implemented by administrative fiat, with no political control or input whatsoever over whether such a system should be implemented, and if so, how it should be implemented. In this respect it is noteworthy that Petitioners strenuously argued in the courts below that the directive was invalid because it never was subjected to the formal regulation promulgation process, as required by the New York State Constitution, and thus never was subjected to the normal political inhibitions against such intrusive and irrational programs. Indeed, the failure to follow normal promulgation processes wrongfully deprived Petitioners of their rightfully expected input into the only political system available to challenge the OEDS implementation. This access to a political system, too, has been recognized as a fundamental constitutional right not to be lightly abrogated. *Wesberry* v. *Sanders,* 376 U.S. 1 (1964).

Moreover, in this era of increasing governmental intrusion into the rights of citizens by informational reporting requirements, see generally Tribe, American Constitutional Law, §15-7 pp. 966-973, it would be

outrageous to conclude that there need be no procedural controls over compilation and use of personal information. The threat of misuse of such information, and indeed the right to compile and hold it in the first place, raises important due process constitutional questions. See *California Bankers Ass'n. v. Schultz*, 416 U.S. 21, 78 (concurring opinion of Powell, J.) 79 (dissenting opinion of Douglas, J.) 91 (dissenting opinion of Brennan, J.) 93 (dissenting opinion of Marshall, J.).

Considering the OEDS informational requirements against any reasoned constitutional standard requires their abrogation. No express statutory authorization for them exists; no clearly articulated regulation implements them, and there has been a total absence of any meaningful public scrutiny of the need for the informational requirements, or the uses to which the information will be put. Simply stated, no procedural protection beyond the whim of an agent of Respondent has preceded the implementation of a wholesale and highly personal information gathering scheme, and due process will not admit of such a lack of fundamental procedural protections. For this reason, the OEDS requirements should, on due process analysis, be treated as a legal nullity.

D

The Petitioners Were Denied Due Process By the Refusal to Afford Them a Hearing

The actions of the Respondent in requiring Petitioner schools to complete the OEDS forms are rendered more outrageous by the refusal of the Respondents to afford Petitioners a constitutionally mandated hearing

concerning the deprivation under review. See *Golderg v. Kelley,* 397 U.S. 254 (1970). Appellants promptly requested a hearing and a stay of the denial of their license renewal shortly after they were advised that their applications for license renewal were denied. However, Respondents denied the request for a hearing, thereby preventing the Petitioners from articulating the moral and practical objections that they had to the OEDS reporting requirements. Certainly, it would have been an appropriate fact to establish at such a hearing that Petitioners were morally and practically unable, in good faith or with any degree of accuracy, to comply with the directive of the Respondents regarding the OEDS forms and the personal data of their students. Moreover, the denial of the license renewals was an apparent subterfuge to deprive Appellants of the hearing that would have been afforded had revocation proceedings been commenced.

Section 5003 of the New York Education Law empowers the Commission of Education to suspend or revoke a school's authorization to operate, but no final determination of revocation is made until the school is afforded an opportunity for a hearing (Education Law, §5003, subd. 4). However, instead of providing such a hearing, Respondents contended that no hearing was necessary due to the fact that Appellants failed to complete the license application process based on the failure to submit the OEDS forms. In this respect it is noteworthy that there is nothing in the Record to demonstrate that the OEDS forms were part of the license renewal process. The OEDS forms never have been required to be submitted with the license application, and this is clearly demonstrated by the fact that the OEDS forms were submitted by all schools on the same date, while different schools

did not necessarily have the same renewal date for their licenses.

In any event, it is clear that Petitioners were licensed, operating schools at the time of the renewal applications, and that denial of these applications for failure to submit the OEDS forms and the directive to close the school doors cannot be characterized as anything other than a revocation of previously granted authority to operate as licensed schools. The refusal to submit the data in question was a matter of principle, and Respondent's action was obviously punitive and designed to do far more than enforce the informational requirements of the application process. It was designed to eliminate an existing authorization to operate schools.

The renewal process involves the right to continue in business, a recognized property right which entitles the holder to due process protections *Duplex Co. v. Deering,* 254 U.S. 443, 465; *Truax v. Corrigan,* 257 U.S. 312. For the Petitioners, as private schools, the license renewal process involves their very right to exist, and this right has been afforded constitutional status. *Pierce v. Society of Sisters,* 268 U.S. 510. Therefore, in the face of such punitive action designed to divest an existing right to operate the schools, Petitioners were entitled to a hearing on constitutional due process grounds.

CONCLUSION

A writ of certiorari should be issued to review the opinion and judgment of the New York State Court of Appeals.

Respectfully submitted,

Cornelius D. Murray
O'CONNELL AND ARONOWITZ, P.C.
Attorneys for Petitioners
Office and P.O. Address
100 State Street
Albany, New York 12207
(518) 462-5601

Peter L. Danziger, Esq., of Counsel
Thomas F. Gleason, Esq., of Counsel

APPENDIX

A1

Decision, Court of Appeals.

No. 35

In the Matter of Richard I, Inc., et al.,

Appellants,

v.

Gordon Ambach, as Commissioner of Education of the State of New York, et al.,

Respondents.

Order affirmed, with costs, for reasons stated in the opinion by Justice Michael E. Sweeney at the Appellate Division (90 AD2d 127).
Chief Judge Cooke and Judges Jasen, Jones, Wachtler, Meyer and Kaye concur.
Judge Simons took no part.

In the Matter of RICHARD I, INC., Doing Business as RICHARD I SCHOOL OF BEAUTY CULTURE, et al., Appellants, v GORDON AMBACH, as Commissioner of Education of the State of New York, et al., Respondents.

Argued January 9, 1984; decided February 14, 1984

SUMMARY

APPEAL from an order of the Appellate Division of the Supreme Court in the Third Judicial Department, entered December 20, 1982, which (1) reversed, on the law, a judgment of the Supreme Court at Special Term (HAROLD J. HUGHES, J.; opn 109 Misc 2d 893), entered in Albany County in a proceeding pursuant to CPLR article 78, annulling determinations of respondents which denied petitioners' applications for renewal of their licenses, declaring that respondents did not possess the authority to require private schools to collect and report data required in occupational education data system (OEDS) forms 7 and 8, and remanding the proceeding to respondents for reconsideration of the license applications, and (2) dismissed the petition.

Petitioners, as operators of private cosmetology schools licensed by the State Education Department, sought to challenge denial of their license renewal applications, which occurred after petitioners refused to submit information concerning their students' racial and ethnic background, possible academic and economic disadvantages, and related information. Petitioners then commenced this proceeding to annul the determinations and for injunctive relief, contending that respondents' actions were illegal and beyond statutory or regulatory authority; that peti-

tioners were entitled to a hearing before denial of their applications; and that respondents' determinations were arbitrary and capricious.

The Appellate Division concluded that there was broad authority both by statute (Education Law, § 5003, subd 2, par b) and regulation (8 NYCRR 126.10 [b] [2], [3]) to justify respondents' right to compel submission of the forms in question; that the "observational technique" adopted by respondents to gather the required data was not arbitrary and capricious; that the information supplied did further the purposes of the Legislature in monitoring discrimination in the school system; that the students' right of privacy was not violated, and that a hearing was not required on the denial of a renewal application.

Matter of Richard I v Ambach, 90 AD2d 127, affirmed.

HEADNOTE

Schools - Private Schools - Licensing

In a proceeding to annul determinations of the State Education Department denying applications by petitioners for renewal of their licenses to operate cosmetology schools because petitioners refused to submit required information on the application forms concerning students' racial and ethnic backgrounds, possible academic and economic disadvantages and related information, an order of the Appellate Division, which reversed a judgment annulling the determinations and dismissed the petition, is affirmed for reasons stated in the thereat, which concluded that there was broad authority both by statute (Education Law, § 5003, subd 2, par b) and regulation (8 NYCRR 126.10 [b] [2], [3]) to justify respondents' right to compel submission of the forms in question; that the "observational technique"

adopted by respondents to gather the required data was not arbitrary and capricious; that the information supplied did further the purposes of the Legislature in monitoring discrimination in the school system; that the students' right of privacy was not violated; and that a hearing was not required on the denial of a renewal application.

APPEARANCES OF COUNSEL

Thomas F. Gleason, Peter L. Danziger and *Barbara G. Billet* for appellants.

Frederick W. Burgess, Robert D. Stone and *Donald O. Meserve* for respondents.

OPINION OF THE COURT

Order affirmed, with costs, for reasons stated in the opinion by Justice Michael E. Sweeney at the Appellate Division (90 AD2d 127).

Concur: Chief Judge Cooke and Judges Jasen, Jones, Wachtler, Meyer and Kaye. Taking no part: Judge Simons.

In the Matter of Richard I, Inc., Doing Business as Richard I School of Beauty Culture, et al., Respondents, v Gordon M. Ambach, as Commissioner of Education of the State of New York, et al., Appellants.

Third Department, December 2, 1982

SUMMARY

Appeal from a judgment of the Supreme Court at Special Term (Harold J. Hughes, J.). entered August 5, 1981 in Albany County, which converted petitioners' proceeding, brought pursuant to CPLR article 78, into an action for declaratory judgment, and which directed the Department of Education to reconsider petitioners' applications for a renewal of licenses.

Matter of Richard I, Inc. v Ambach, 109 Misc 2d 893, reversed.

HEADNOTE

Schools - Private Schools - Licensing

Petitioners, operators of private cosmetology schools licensed by the Education Department, are properly required to file, as part of their periodic applications for renewal of licensure, information concerning students' racial and ethnic backgrounds, possible academic and/or economic disadvantages and other related information; when a school applies for renewal of its license, it must submit with its application "annual financial reports * and *** such other information as the commissioner may require" (8 NYCRR 126.10 [b] [2], [3]) and such broad authority is ample to justify respondents' right to compel submission of the required information; moreover, subdivision (8) of Section 313 of the Education Law provides that the Commissioner of Education "shall include in his annual report to the legislature *** recommendations for further action to eliminate discrimination in education", and the information requested contributes in effecting this legislative purpose.**

MTR OF RICHARD I v AMBACH [90 AD2d 127] [127]

APPEARANCES OF COUNSEL

Robert D. Stone (Frederick W. Burgess and *Jean M. Coon* of counsel), for appellants.

O'Connell & Aronowitz, P.C. (Peter L. Danziger and *Babara G. Billet* of counsel), for respondents.

OPINION OF THE COURT

Sweeney, J.P.

Petitioners operate private cosmetology schools licensed by the Education Department (department) under the provisions of article 101 of the Education Law. Pursuant to existing law, such schools are required to file periodic

applications for renewal of licensure (Education Law, §§ 5001, 5003). In 1979, the forms on which schools were required to report data to the department were revised so as to require information concerning their students' racial and ethnic backgrounds, possible academic and/or economic disadvantages and other related information. Petitioners refused to submit any data on the new forms which were supplied to them. Thereafter, on December 31, 1980, petitioners were notified without a hearing that their applications for renewal of their licenses were being denied for failure to submit the required forms, and that the schools had 60 days to cease operations. This CPLR article 78 proceeding was commenced seeking an annulment of the determination denying the license renewals and an order permanently enjoining the department from collecting the data in question together with an order compelling the department to grant the license renewals. Special Term annulled the determinations of the department, declared that the department did not possess the authority to require private schools to report the additional information in question, and remanded the proceeding for reconsideration of the license renewal applications (109 Misc 2d 893). This appeal ensued and respondents raise several issues urging reversal.

The paramount issue raised is whether the department has the requisite authority to compel petitioners to submit the forms with the additional requested data. Special Term concluded that they did not. We arrive at a contrary conclusion. Manifestly petitioners' schools fall within the category of schools required to be licensed (Education Law, § 5001). The licenses granted to the schools pursuant to section 5003 of the Education Law were for a period of two years with the right to seek renewal. The application for renewal must be accompanied by a statistical and financial report (Education Law, § 5003, subd 2, par b). The enabling statutes were interpreted by regulation providing that when a school applies for renewal of its license it must submit with its application "annual financial reports on forms prescribed by the commissioner and * * * such other information as the commissioner may require" (8 NYCRR 123.10 [b] [2], [3]). Such broad authority both by statute

and regulation, in our view, is ample to justify respondents' right to compel the submission of the forms in question. We find additional authority for respondents' action in subdivision (8) of section 313 of the Education Law which provides in pertinent part that the Commissioner of Education "shall include in his annual report to the legislature *** recommendations for further action to eliminate discrimination in education if such is needed". The forms, in our opinion, contribute in effectuating this legislative purpose. We find unpersuasive petitioners' contention that respondents lack authority to force petitioners to submit the forms without a specifically promulgated rule or regulation (see *Matter of Organization to Assure Servs. for Exceptional Students v Ambach*, 56 NY2d 518; *Matter of Rubin v Campbell*, 48 NY2d 805).

Petitioners also contend that the "observational technique" adopted by respondents to gather the data required by the forms was arbitrary and capricious since, *inter alia*, it amounted to only an educated guess and served no legitimate governmental purpose. Furthermore, petitioners claim that the manner of obtaining the information violated the students' right to privacy. Both contentions, in our view, lack merit. Petitioners misunderstand the real manner in which the data is to be obtained and the claimed onerous duty imposed. Initially, the schools have only to report data obtained by daily observations of the students in the classroom and school confines together with other information already in their possession gleaned from the original applications submitted by the students for acceptance by the school. While the information supplied is not foolproof, it does further the purpose of the Legislature to ascertain if any discrimination exists in the school system. It is also significant that the department is obligated, as a recipient of Federal assistance funds for use in vocational schools, to ensure that the funds are not being used in a discriminatory manner and to monitor the activities of these schools through the compilation of statistical data (44 Fed Reg 17162, 17165; 34 CFR Part 100, Appendix B). Such information would assist respondents in their affirmative continuing obligation to see that the funds are not used in a discriminatory fashion. Concerning petitioners'

contention that the technique adopted violates the students' right of privacy, we are of the opinion that it tends to ensure such right rather than violate it.

Finally, we reject petitioners' contention that they were improperly denied a hearing. It is significant that we are here concerned with a renewal application and not the suspension or revocation of an existing license. Under such circumstances, a hearing is not required (see *Matter of Hirsch v Hastings*, 70 AD2d 1052).

The judgment should be reversed, on the law, and the petition dismissed, without costs.

KANE, CASEY, WEISS and LEVINE, JJ., concur.

Judgment reversed, on the law, and petition dismissed, without costs.

Order Appellate Division.

PRESENT :

Hon. Michael E. Sweeney,
Justice Presiding,
Hon. T. Paul Kane,
Hon. John T. Casey,
Hon. Leonard A. Weiss,
Hon. Howard A. Levine,
Associate Justices.

In the Matter of RICHARD I, INC.,
Doing Business as RICHARD I SCHOOL OF BEAUTY CULTURE, et al.,
Respondents,

- against-

GORDON M AMBACH, as Commissioner of Education of the State of New York, et al.,
Appellants.

County Clerk's Index No. 1497-81

Appellants having appealed from a judgment of the Supreme Court of Albany County, entered on the 5th day of August, 1981, in the office of the clerk of the County of Albany, and said appeal having been presented during the above-stated term of this Court, and having been argued by Robert D. Stone, Frederick W. Burgess, Esq., of counsel for appellants, and by O'Connell and Aronowitz, Peter L. Danziger, Esq., of counsel for respondents, and, after due

deliberation, the Court having rendered a decision on the 2nd day of December, 1982, it is hereby

ORDERED that the judgment be and hereby is reversed, on the law, and the petition dismissed, without costs.

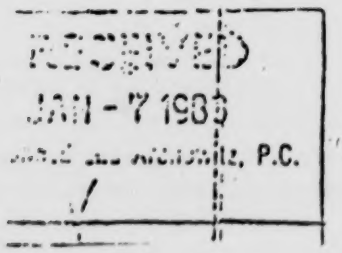
ENTERED:

JOHN J. O'BRIEN

Clerk

DATED AND ENTERED: December 20, 1982.

A TRUE COPY
John J. O'Brien
CLERK



A12

Article 78 Proceeding.

In the Matter of RICHARD I, INC., Doing Business as RICHARD I SCHOOL OF BEAUTY CULTURE, et al., Petitioners, v GORDON AMBACH, as Commissioner of Education of the State of New York, et al., Respondents.

Supreme Court, Special Term, Albany County, July 14, 1981

HEADNOTE

Schools — Private Schools — Licensing

Determinations of the Commissioner of Education denying license renewals to petitioners private cosmetology school operators on the ground that they failed to comply with an administrative directive that they include certain information regarding their students with the information to be submitted as part of their biannual license applications are annulled, where subject administrative directive required the schools to submit statistics on the number of handicapped and economically disadvantaged students and those with limited English-speaking ability, as well as a breakdown of the ethnic-racial background of the student population and further provided that schools employ "some sort of observational technique" to acquire this information, inasmuch as schools cannot require students to provide such information; this attempt, unauthorized by statute or regulation, to require private schools to gather by covert observational technique information about the private lives of their students that cannot be gathered by direct inquiry is arbitrary and capricious. Further, following petitioners' objections to gathering and supplying said information, respondents should have afforded petitioners a hearing pursuant to subdivision 5 of section 5003 of the Education Law and upon constitutional due process grounds; moreover, a valid issue as to a constitutional right to privacy violation, although not reached herein, is raised on these facts.

APPEARANCES OF COUNSEL

O'Connell & Aronowitz, P.C. (Peter L. Danziger of counsel), for petitioners. *Robert D. Stone* and *Frederick W. Burgess* for respondents.

OPINION OF THE COURT

HAROLD J. HUGHES, J.

This article 78 proceeding is brought pursuant to subdivision 6 of section 5003 of the Education Law to review determinations dated December 31, 1980 which denied the applications of petitioners for renewal of their licenses to operate private schools.

Petitioners operate private cosmetology schools subject to licensing by the Education Department (Education Law, § 5001, subd 1). The schools employ six instructors, two secretaries, a bookkeeper and a financial aid officer and have an enrollment of approximately 50 students. The schools have been licensed by the Education Department since the enactment in 1973 of the statute requiring licens-

ing. Pursuant to subdivision 3 of section 5001 of the Education Law a private school is required to renew its license biannually. On February 22, 1979 the Assistant Commissioner for Occupational and Continuing Education issued a directive advising private schools that a new system referred to as the occupational education data system (OEDS) was being implemented requiring schools to collect and report information regarding their students with the information to be submitted as part of the license application. The schools were required to complete OEDS forms 7 and 8 and to maintain records to substantiate the data. Petitioners objected, upon several grounds, to collecting the information sought and requested a hearing upon the issue. That request was denied and by written communications of December 31, 1980 petitioners were advised that their applications to renew licenses were denied by reason of their failure to submit OEDS forms 7 and 8 for the reporting period of July 1, 1978 to June 30, 1979. The schools were directed to cease operation within 60 days. This proceeding ensued.

The directive of February 22, 1979 provides in pertinent part:

"A number of schools returning comments have requested a citation of the Department's authority for the collection of information from their schools. Section 215 of Education Law empowers the Commissioner of Education with the general authority to collect information from any school or institution under the educational supervision of the State. Section 5003 of Education Law and Sections 126.7 and 126.11 of the Regulations of the Commissioner of Education contain specific mandates for the collection of information from Licensed Private Schools and Registered Private Business Schools. Data requested on OEDS forms 7 and 8 are part of the data to be required by the Department and all schools should begin to maintain records that are compatible with the information categories listed on the forms.

"The reports being sent to you for completion are the result of an extensive Department analysis and contain only the most essential data elements required for state level planning, administration and Federal reporting pur-

poses. Obtaining information from all types of educational agencies participating in the training process will enable the SED to develop a more accurate and comprehensive picture of the number of people being trained for employment in specific occupations. * * *

"The other types of information requested on OEDS forms will be exempted from audit since schools cannot require students to identify their racial/ethnic background, academic or economic disadvantagements (including limited English-speaking ability) or handicapping conditions. These data categories are not voluntary, however, and schools should use some sort of observational technique at the time of registration (or other appropriate time) to obtain the data needed to complete these sections of the form. Schools should be prepared to document the procedures they have used to summarize the data presented in these categories."

The specific instructions for completing OEDS form 7 direct in part, as follows:

"Disadvantagement, Handicapping Condition: In column 5, indicate the number of students reported in columns 1-4 that have academic and/or economic disadvantagements that markedly interferes with their ability to successfully complete their occupational program at this school. Academic disadvantages are defined as a lack of sufficient reading, writing or mathematical skills. Economic disadvantagements which may be considered are (1) unemployment, (2) receipt of public assistance (welfare) under federal state or local programs, (3) institutionalization or State guardianship, (4) family income below established poverty level criteria, or (5) Student Financial Aid Programs (i.e. BEOG, SEOG, TAP, Student Loans).

"In column 6, indicate the number of students reported in columns 1-4 that have handicapping conditions (other than academic or economic disadvantagements) that markedly interferes with their ability to successfully complete their occupational program. Handicapping conditions which may be considered are mental retardation, hearing impairments and deafness, speech impairment, visual impairment and blindness, serious emotional disturbances,

orthopedic impairments, and other serious health impairments.

"Students who have both an academic or economic disadvantagement *and* a handicapping condition should be *reported only once* in the handicapped category.

"Section II — Number of Students Enrolled with Limited English-Speaking Ability (LESA)

"Of the *total* number of students reported in Section I, columns 1-4, for all programs, indicate the number by sex, whose native tongue is a language other than English or who come from environments where a language other than English is dominant and because of either of these reasons have difficulties speaking and understanding instructions in the English language. Report students as 'LESA' only if their language impairment is severe enough for this school to provide special assistance or a modified program in order for the students to successfully complete the program.

"Section III — Racial/Ethnic Composition of Students Enrolled

"Of the total number of students reported in Section I, columns 1-4, for all programs, indicate the number of students identified as belonging to each of the racial/ethnic classifications defined below:

"*American Indian or Alaskan Native* — A person having origins in any of the original peoples of North America.

"*Black, not of Hispanic Origin* — A person having origins in any of the black racial groups.

"*Asian or Pacific Islander* — A person having origins in any of the original people of the Far East, Southeast Asia, or the Pacific Islands. This area includes, for example, China, Japan, Korea, the Phillipine Islands and Samoa.

"*Hispanic* — A person of Mexican, Puerto Rican, Cuban, Central or South American, or other Spanish culture or origin, regardless of race.

"*White, not of Hispanic Origin* — A person having origins in any of the original peoples of Europe, North Africa, the Middle East, or the Indian subcontinent.

"Schools do not have to require students to specify their race or ethnic background and/or maintain this information as part of the student's permanent record. Data to be reported here could be based on the observations of personnel involved in the registration process at the school or personnel having regular direct contact with the students (i.e. teaching staff, registrar, etc.)."

OEDS form 8 requests similar information with respect to handicapping conditions, economic disadvantage and racial-ethnic background. Petitioners vigorously protest the attempt by respondents under the guise of the licensing power to compel them to gather by covert observational techniques information about the private lives of their students that may not be obtained by direct inquiry of the students. Petitioners' objections are: (1) the directive of February 22, 1979 has never been formally adopted as a rule or regulation and thus is without binding effect; (2) there is no authority by statute or regulation authorizing the Education Department to gather the information requested in forms 7 and 8; (3) the required collection of the data by private schools is an intrusion and a costly burden upon private education; (4) no observational techniques exist which would enable the schools to gather the information requested in the forms; (5) the schools have been deprived of due process by the denial of their request for a hearing; (6) the administrative activity here under review is arbitrary and capricious; and (7) the petitioners', and their students', rights under the New York State and Federal Constitutions to privacy, liberty, and freedom from unjustified governmental intrusion have been infringed upon. Two students of the schools have joined in this proceeding as petitioners alleging violation of their rights to privacy.

Respondents' defenses are that: (1) sections 215 and 5003 of the Education Law and the regulations found at 8 NYCRR 126.7 and 126.11 mandate the collection of this information; (2) petitioners are the only schools of approximately 350 schools licensed and registered in the State which refused to supply this information and by failing to submit a complete license application they cannot now be heard to complain that the denial of renewal was arbitrary

and capricious; (3) petitioners' contention that they are unable to compile the required data by observational techniques is specious since 348 other schools have done so; (4) pursuant to Federal law and the regulations promulgated thereunder, schools having in attendance students receiving Federal moneys are required to compile information related to the racial and ethnic composition of the student populace and, having received direct financial aid, the petitioners are obligated by Federal law and regulations to compile and report data to the Federal authorities; (5) the data requested in the forms is necessary for long-range planning on the State and Federal levels with respect to the delivery of vocational educational programs; (6) there are other programs available for the individual student petitioners; therefore, the respondents seriously question statements made by the students in their affidavits; (7) the denial of a hearing was justified because the statute does not require a hearing when the applicant refuses to complete the license process.

The determinations denying renewal of petitioners' licenses shall be annulled. Initially, the Appellate Division has recently held that the Commissioner of Education may not adopt an across-the-board directive applicable in all instances to all applicants without formally adopting a regulation or rule to that effect *(Matter of Organization to Assure Servs. for Exceptional Students v Ambach,* 82 AD2d 993). That is precisely what the respondents did by a requirement that all private schools licensed by the State gather the information requested in OEDS forms 7 and 8 or be denied renewal of their licenses. Such a sweeping decree should be enacted with all of the safeguards attending formal adoption of a regulation and not by a directive from an assistant commissioner.

The petitioners' second objection to the determinations is equally well taken. In the area of information gathering from persons subject to its jurisdiction, an administrative agency is not free to act beyond the authority extended by statute or a regulation promulgated within the authority delegated by a State *(Rapp v Carey,* 44 NY2d 157). That is so in order to assure appropriate safeguards as to the

information gathered (*State of New York v Jacobus*, 75 Misc 2d 840, 845, 846). Here, the respondents rely upon the following language from subdivision 3 of section 5001 of the Education Law: "Application and renewal application for a license as a private school, together with financial and statistical reports required by the commissioner shall be filed on forms prescribed and provided by the department."

Additionally, respondents rely upon the language of 8 NYCRR 126.10 that requires an applicant for a license to conduct a private school to submit together with the application "such other information as [the commissioner] may require". Respondents also cite various Federal statutes and regulations for the authority to require the gathering of the data. The court has reviewed the language of the applicable statutes and regulations and finds no authority therein for the gathering of this information in the manner required by the respondents. This court holds that in view of the imposition of the onerous duties, costs, and invasion of privacy entailed by OEDS forms 7 and 8, specific statutory language authorizing the gathering of this information is required.

Respondents' reliance upon the allegation that the petitioners may be in violation of Federal statutes and regulations with respect to the submission of information is no basis for denying a license under State law since the Federal statutes and regulations specifically address noncompliance with required disclosure and contain their own penalties, such as the cutting off of Federal moneys.

The petitioners' fourth point with respect to the practical impossibility of gathering the information without direct inquiry of the students is valid. The court fails to discern how the petitioners can reasonably be expected to make covert investigation of the economic background of its students to ascertain a family's income and the sources thereof. Moreover, the operators of this cosmetology school cannot reasonably be required to make medical evaluations as to whether their students are mentally retarded or emotionally disturbed. Compelling untrained personnel to make sensitive evaluations of the mental, emotional and physical condition of students based upon covert observational techniques is, at best, irrational. Furthermore, to

complete OEDS forms 7 and 8 petitioners must determine by observational techniques whether their students have any serious health impairments that would interfere with their ability to finish the occupational program which might compel a serious invasion of students' privacy.

Turning to the request for racial and ethnic information, it would be unreasonable to expect the operators of these small private schools to determine simply by observation the ethnic and racial background of the students. Discerning a Pacific Islander from an Alaskan native, or a black not of Hispanic origin from a black of Hispanic origin, may be within the competence of the Department of Education but would be difficult for most members of society. Counsel for respondents recognized this upon the argument of the motion and conceded that all the Education Department wanted from the schools was "an educated guess". This court holds that it is not reasonable to formulate long-range planning on the State and Federal levels with respect to delivery of vocational educational programs based upon guesses educated or otherwise. Finally, there is something abhorrent in these inquiries that is counter to the accepted value of this society that persons should advance by merit unhindered by racial or ethnic background. The stereotyping by guess mandated by respondents cannot serve to further any legitimate governmental end.

Many of the other points raised by petitioner also have merit, but shall not be addressed at length. Suffice it to say, that the action of the respondents in attempting to require a private school to gather by covert observational techniques information about the private lives of their students that cannot be gathered by direct inquiry is arbitrary and capricious. Furthermore, under the circumstances of this case the respondents should have afforded petitioners a hearing both pursuant to the statute (Education Law, § 5003, subd 5) and upon constitutional due process grounds. Finally, were the court to reach the right of privacy contentions raised by the petitioners, it would be inclined to expand the right of privacy enunciated by the Supreme Court in cases such as *Griswold v Connecticut* (381 US 479) and *Shelton v Tucker* (364 US 479) to encompass a right of information privacy (see comment on The

Use and Abuse of Computerized Information, 44 Albany L Rev 589). The inexorable infringement upon citizens' privacy by governmental planners in the name of societal good requires from the courts close scrutiny to balance legitimate government needs against those of its citizens. Mr. Justice BRANDEIS stated the need of our citizens best in his dissent in *Olmstead v United States* (277 US 438, 478): "The makers of our Constitution undertook to secure conditions favorable to the pursuit of happiness. They recognized the significance of man's spiritual nature, of his feelings and of his intellect. They knew that only part of the pain, pleasure and satisfactions of life are to be found in material things. They sought to protect Americans in their beliefs, their thoughts, their emotions and their sensations. They conferred, as against the Government, the right to be let alone — the most comprehensive of rights and the right most valued by civilized men."

The application of petitioners for a judgment annulling the determinations of December 31, 1980 which denied their applications for renewal of licenses and ordered them to cease operations shall be granted, without costs, and the court shall, to the extent necessary (*Matter of Croissant v Zoning Bd. of Appeals of Town of Woodstock*, 83 AD2d 673), convert the proceeding to an action (CPLR 103, subd [c]) and grant the requested declaratory relief declaring that the Commissioner of Education and the Education Department of the State of New York do not possess the authority to require private schools to collect and report the data required in OEDS forms 7 and 8, as the forms are presently comprised. This matter shall be remanded to the Education Department with direction to reconsider petitioners' applications for renewal of licenses in view of this decision, and the stay contained in the order to show cause of February 17, 1981 will be continued until petitioners receive notice from the Education Department of its determination upon the reconsideration of the license renewal applications.

Petition.

STATE OF NEW YORK
SUPREME COURT COUNTY OF ALBANY

In the Matter of the
Application of Richard I,
INC. d/b/a Richard I School
of Beauty Culture, Ejry, Inc.
d/b/a Richard I Beauty School,
Violet Curry, and Delores Ector,

Petitioners,

-against-

VERIFIED PETITION

Gordon Ambach, As
Commissioner of Education
of the State of New York,
and the Education Department
of the State of New York,

Respondents.

For an Order and Judgment pursuant to Article 78 of the Civil Practice Law and Rules.

To: THE SUPREME COURT OF THE STATE OF NEW YORK, COUNTY OF ALBANY

Petitioners, by their attorneys, O'Connell and Aronowitz, P.C., as and for a Petition, respectfully allege that:

1. Ejry, Inc. is a domestic corporation doing business as Richard I Beauty School located in Poughkeepsie, New York, Richard I, Inc. is a domestic corporation doing business as Richard I School of Beauty Culture located in Kingston, New York, (hereinafter referred to as "the schools"). Richard I School of Beauty Culture in Kingston was established in 1963, and Richard I Beauty School in Poughkeepsie was established in 1965. The schools offer a 1000 hour program of instruction to qualify students to take the New York State Board Examination for Licensing as a Cosmetologist. Upon successful completion of the program a student may obtain a six month permit to work as a cosmetologist.

2. The schools have been licensed by the New York State Education Department and are accredited by the Cosmetology Accrediting Commission (the national accrediting body for cosmetology schools recognized by the United States Department of Education). The schools have been approved by the New York State Education Department for the training of veterans, the New York State Education Department-Office of Vocational Rehabilitation and the United States Department of Health and Human Resources Social Security Administration.

3. The schools employ six instructors, two secretaries, a bookkeeper and a financial aid officer. More than fifty students are currently enrolled in the schools.

4. Petitioners, Delores Ector and Violet Curry reside in the State of New York and are presently attending the schools.

5. Respondent Gordon Ambach is the duly appointed and serving Commissioner of Education of the State of New York, with his principal office located in the City and County of Albany, and as such is the Chief Administrative Officer of the Education Department, a Department of the State of New York responsible for licensing of private schools, (hereinafter referred to as the " State Education Department").

6. The schools have been operated under the supervision of the State Education Department since they were established in the 1960's. In 1973 New York statutes were enacted requiring private schools to be licensed by the State Education Department. The schools, thereafter, were licensed by the State Education Department and each year submitted an application for annual renewal of license as required pursuant to §5001 of the New York State Education Law and § 126.10 of the regulations of the Commissioner of Education.

7. Section 5001(3) of the New York State Education Law provided that:

Application, renewal application and fees. Application and annual renewal application for a license as a private school, together with financial and statistical reports required by the Commissioner shall be filed on forms prescribed and provided by the Department...

(Section 5001(3) was amended in 1980 to provide biannual renewal).

8. Section 126.10 of the regulations of the Commissioner of Education (as amended January 1, 1980), provide that:

School license or registration required; licensing or registration procedure.

(a) Every applicant shall submit an application for licensure of a private school or registration of a private business school, upon forms provided by the Commissioner, together with such other information as he may require including applications for approval of curricula or courses of study, quarters or facilities, director's licenses and teacher's licenses, and documentation of adequacy of resources. The application shall be accompanied by the statutory fee.

(b) An application for annual renewal of any license or registration shall be submitted at least 60 days prior to the expiration date of the current authorization, on form prescribed by the Commissioner and accompanied by:

(1) The statutory fee.

(2) Annual statistical and financial reports on forms prescribed by the Commissioner.

(3) Such other information as the Commissioner may require...

9. Section 126.3 (e) of the regulations of the Commissioner of Education (as amended January 1, 1980) require that each licensed private school publish a catalog or bulletin which includes:

(iii) data regarding student retention and job placement for the two most recent reporting periods, or average thereof so identified for each course or program, indicating the number of students who are enrolled at the start of the reporting period; the number enrolled during the reporting period; the number still attending at the end of the reporting period and the number who have graduated and discontinued during the reporting period; and the number of those graduates placed during the reporting period and the occupation for which they were trained. Reporting period is defined as that 12 month period of time commencing 15 months prior to expiration of license or registration and ending 3 months prior to expiration of license or registration, or as otherwise defined by the Commissioner;...

10. Other regulations of the Commissioner of Education regarding licensed private schools set forth many general and specific requirements regarding conduct of the school, advertising, standards and methods of instruction, equipment and housing, qualifications of teaching and management personnel, enrollment agreement or contract and methods of collecting tuition and other charges, resources, bond, school license or registration required, records, private school agent's certificate, exemptions and disciplinary action.

11. By directive dated February 22, 1979, issued by the Assistant Commissioner for Occupational and Continuing Education, the schools were advised that a new system referred to as the Occupational Education Data System ("OEDS") was being implemented to require schools to collect and report information regarding their students. Schools were required to complete OEDS forms 7 and 8 and to maintain records to substantiate the data. (A copy of the directive dated February 22, 1979, together with OEDS forms 7 and 8 is annexed hereto as Exhibit "A").

12. The new directive was neither a rule promulgated by the Board of Regents of the University of the State of New York nor a regulation promulgated by the Commissioner of Education and the Board of Regents.

13. The directive required schools to collect data and report on:

(a) The number of students enrolled in the program.

(b) The number of students completing the program.

(c) The number of students leaving prior to completion.

(d) The number of students completing who became employed and whether they were employed in a related field, slightly related field, unrelated field, or military.

(e) The number of students unemployed and whether they were seeking employment, pursuing additional education or other reason.

(f) The number of students with status unknown.

(g) The number of students leaving the program prior to completion and whether they had obtained employment, entered military, dropped out-financial reasons, dropped out-other reasons, failed to meet program standards, or the program did not meet student needs/expectations.

(h) The information was also reported by the sex of the student.

14. The new directive also requires schools to collect data and report on the number of students having a disadvantagement or handicapping condition that markedly interferes with their ability to successfully complete their programs. Academic disadvantages are defined as a lack of

sufficient reading, writing or mathematical skills. Economic disadvantages which may be considered are unemployment, receipt of public assistance (welfare) under federal, state, or local programs, institutionalization or State guardianship, family income below established poverty level criteria, or Student Financial Aid Programs (i.e. BEOG, SEOG, TAP, Student Loans). Handicapping conditions which may be considered are mental retardation, hearing impairments and deafness, speech impairment, visual impairment and blindness, serious emotional disturbances, orthopedic impairments, and other serious health impairments. (See Exhibit "A", directive dated February 22, 1979, pages 3-4).

15. The schools are also required to collect data and report on the number of students belonging to each of the following racial/ethnic classifications.

(a) American Indian or Alaskan Native.
(b) Black, not of Hispanic Origin.
(c) Asian or Pacific Islander.
(d) Hispanic.
(e) White, not of Hispanic Origin.

16. In order to obtain information on retention and placement, the schools must contact students after they drop out or graduate. This task is very time consuming, expensive and the information obtained often is unreliable. Students may be uncooperative or provide inaccurate information.

Richard I Beauty School and Richard I School of Beauty Culture are proud of their record of placement of graduates, but believe the requirements to gather this information is an infringement on the students and the schools liberties and personal freedoms. The schools do not use placement statistics in advertising nor do they use the statistics for recruitment purposes. Although students at the schools may be eligible for state or federal loans or grants the schools do not receive any local state or federal monies. Petitioners assert that the required collection of this data by the schools is an unwarranted intrusion into and a costly burden upon private education.

17. No New York State statute, rule nor regulation requires schools to provide such specific information as set forth in the OEDS forms 7 and 8 such as whether students are disadvantaged, handicapped of limited English speaking ability or belonging to specified racial/ethnic classifications.

18. In a Report to the Commissioner of Education dated July 5, 1979, the State Education Department admitted that §126.3 of the Commissioners Regulations did not provide the authority for the implementation of the OEDS. (Copy of page 6 of report, annexed as Exhibit "B"). Although the State Education Department recommended amendments to the regulations to provide for implementation of the OEDS, no such regulations were promulgated.

19. In his directive, dated February 22, 1979, the Assistant Commissioner for Occupational and Continuing Education stated that:

> ...schools cannot require students to identify their racial/ethnic background, academic or economic disadvantagements (including limited Englishspeaking ability) or handicapping conditions. These data catagories are not voluntary, however, and schools should use some sort of observational technique at the time of registration (or other appropriate time) to obtain the data needed to complete these sections of form. Schools should be prepared to document the procedures they have used to summarize the data presented in these categories. (Emphasis added) (See Exhibit "A", Directive dated February 22, 1979, page 2).

20. By letter dated March 14, 1979 and March 20, 1979, the schools objected to the new requirements imposed by directive of the Assistant Commissioner for Occupational and Continuing Education and raised questions and asked for clarification of many issues including: a request for a description of "observational techniques" which would enable schools to obtain the required data regarding disadvantagement, handicap or racial/ethnic classification. (Copies of letters dated March 14, 1979, and March 30, 1979, are annexed as Exhibit "C").

21. The State Education Department has never described to the schools the observational techniques to be used to collect and report on the racial/ethnic classification of its students nor regarding disadvantagement nor handicapping condition.

22. No observational techniques exist which would enable the schools to meet the new requirements of OEDS Forms 7 and 8.

23. The schools do not discriminate against students nor prospective students and they never have been accused of doing so by Respondents.

24. The schools submitted applications for renewal of licenses, completing all information as they had done in prior years, including information regarding student retention and job placement, but the schools refused to prepare or file OEDS forms 7 and 8.

25. By letter dated December 31, 1980, the schools were advised that their applications for renewal of licenses were denied because they had not submitted OEDS forms 7 and 8 for the reporting period July1, 1978 to June 30, 1979. The schools were advised that they had 60 days from the date of the letter to cease operation as licensed schools. (Copies of letters dated December 31, 1980, are annexed hereto as Exhibit "D" together with copies of OEDS forms 7 and 8 for the reporting period July 1, 1978 to June 30, 1979).

26. The schools had orally requested a hearing prior to denial of their application for renewal of license and prior to their revocation of their authority to operate as licensed schools, and subsequently the schools by their attorneys, requested a hearing and a stay of the matter pending resolution of the issues. (A copy of letter dated and served on January 29, 1981, is annexed hereto as Exhibit "E").

27. By letter dated February 10, 1981, Respondent Ambach denied the schools requests for a hearing and for a stay.

28. Petitioners, Richard I School of Beauty Culture and Richard I Beauty School have been operating as private schools in the State of New York under the supervision of the New York State Education Department for over 15 years. The schools have been duly licensed as private schools since required by statute in 1973.

29. The schools are entitled to a due process hearing prior to action by Respondents which restrict their rights, powers or privilege or which revoke or deny their authorization to continue to operate.

30. If the schools are denied their authority to operate as licensed schools, they will be irreparably harmed by reason of loss of reputation and standing in the academic community, loss of approval by various state and federal agencies, loss of national accreditation, closure of the schools and resulting financial damage.

31. If the schools are denied their authority to operate as licensed schools, the students of the schools will be irreparably harmed by the discontinuation of their educational programs, by the loss of their free choice of educational institution and programs, by their inablility to complete required programs to enable them to work as cosmetologists and by their loss of employment opportunities.

32. Petitioners Curry and Ector will suffer immediate and irreparable harm and will be unable to enroll in or attend educational programs of equal quality as those offered in the schools, by reason of unavailability of other similar educational programs which are geographically accessible and financially accessible to these Petitioners.

33. Respondents have proceeded in excess of their jurisdiction and in excess of any statutory or regulatory authority, have made a determination in violation of lawful procedure which was arbitrary and capricious and an abuse of discretion.

34. Petitioners' New York State and Federal constitutional rights have been violated and their basic rights to privacy, liberty and freedom from unjustified governmental intrusion have been infringed upon.

35. No other provisional remedies have been sought in this matter.

Wherefore, Petitioners respectfully request that this Court grant a Judgment:

(a) Annulling the determination dated December 31, 1980, which denied the schools applications for renewal of licensed and ordered the schools to cease operation as licensed schools;

(b) Prohibiting and permanently enjoining Respondents from requiring the schools to collect and report the data as required in OEDS Forms 7 and 8;

(c) Compelling Respondents to grant the schools' applications for renewal of licenses; and

(d) Awarding Petitioners such other, further and different relief as to this Court may seem just and proper.

Dated: February 16, 1981

Yours, etc.

O'CONNELL AND ARONOWITZ. P.C.
(Peter L. Danziger and
Barbara G. Billet, of Counsel)
Attorneys for Petitioners
Office and P.O. Address
100 State Street
Albany, New York 12207
Tel. (518) 462-5601

STATE OF NEW YORK)
) ss. :
COUNTY OF)

Joel Kobran, President, Ejry, Inc. being duly sworn, deposes and says that it is one of the Petitioners, in this action; that he has read the foregoing Verified Petition and knows the contents thereof; that the same is true to the knowledge of deponent, except as to the matters therein stated to be alleged upon information and belief, and as to those matters he believes it to be true.

JOEL KOBRAN

Joel Kobran

Sworn to before me this
16th day of February, 1981.

FRANCES M. BURKE

Notary Public, State of New York

Frances M. Burke
Notary Public, State of New York
Qualified in Rensselaer County
Commission Expires March 30, 1981

No. 83-1847

IN THE

Supreme Court of the United States

October Term, 1983

RICHARD I, INC., d/b/a RICHARD I SCHOOL OF BEAUTY CULTURE, EJRY, INC., d/b/a RICHARD I BEAUTY SCHOOL, VIOLET CURRY and DOLORES ECTOR,

Petitioners,

vs.

GORDON AMBACH, as Commissioner of Education of the State of New York, and the Education Department of the State of New York,

Respondents.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF NEW YORK

ROBERT D. STONE
Counsel and Deputy Commissioner for Legal Affairs
State Education Department
State Education Building
Albany, New York 12234
(518) 474-8932

FREDERICK W. BURGESS
DONALD O. MESERVE
of Counsel

Batavia Times Publishing Co.
Batavia, N.Y. (716) 344-2000

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Questions Presented for Review

DOES THE JUDGMENT OF THE COURT OF APPEALS OF THE STATE OF NEW YORK DETERMINE A SUBSTANTIAL QUESTION OF PETITIONERS FEDERAL CONSTITUTIONALLY GUARANTEED RIGHTS WHICH SHOULD BE REVIEWED BY THIS COURT?

A. Should this Court review the determination of New York Court of Appeals that the Commissioner of Education proceeded properly and in accordance with State law in requesting the Richard I schools to submit certain statistical data relating to its students?

B. Should this Court review the determination of New York Court of Appeals that the collection of that data in the manner suggested by the Commissioner of Education did not constitute an infringement of a right of privacy or other property interest of either Richard I schools or students Violet Curry and Dolores Ector?

C. Should this Court review the determination of the New York Court of Appeals that respondents' denial of petitioner Richard I schools' application for renewal of licensure did not violate any due process right due the schools?

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OFFICIAL COMPILATION OF THE CODES, RULES AND REGULATIONS OF THE STATE OF NEW YORK (NYCRR).

IN THE

Supreme Court of the United States

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No. 83-1847

RICHARD I, INC., d/b/a RICHARD I SCHOOL OF BEAUTY CULTURE, EJRY, INC., d/b/a RICHARD I BEAUTY SCHOOL, VIOLET CURRY and DOLORES ECTOR,

Petitioners,

vs.

GORDON AMBACH, as Commissioner of Education of the State of New York, and the Education Department of the State of New York,

Respondents.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF NEW YORK

Respondents Gordon M. Ambach, as Commissioner of Education of the State of New York, and the Education Department of the State of New York respectfully pray that the petition herein for writ of certiorari to the Court of Appeals of the State of New York be denied.

Opinions Below

The decision of the New York State Court of Appeals is reported at 62 NY 2d 784 and appears at A1-A4 of the petition for certiorari. The Appellate Division decision is reported at 90 AD 2d 127 and appears at pgs. A5-A11 of the petition. The Special Term decision is reported at 109 Misc. 2d 893, 441 NYS 2d 352, and appears at pgs. A12-A20 of the petition.

Jurisdiction

The asserted basis of jurisdiction is 28 U.S. Code, Section 1257(2), based upon an alleged deprivation of a right to due process under the Fifth and Fourteenth Amendments to the United States Constitution. The citation appears to be in error since this is a petition for certiorari and not an appeal.

Statutes Involved

McKinney's Consolidated Laws of New York,
Book 16, Education Law

§214. Institutions in the university

The institutions of the university shall include all secondary and higher educational institutions which are now or may hereafter be incorporated in this state, and such other libraries, museums, institutions, schools, organizations and agencies for education as may be admitted to or incorporated by the university. The regents may exclude from such membership any institution failing to comply with law or with any rule of the university.

§215. Visitation and reports

The regents, or the commissioner of education, or their representatives, may visit, examine into and inspect, any institution in the university and any school or institution under the educational supervision of the state, and may require, as often as desired, duly verified reports therefrom giving such information and in such form as the regents or the commissioner of education shall prescribe. For refusal or continued neglect on the part of any institution in the university to make any report required, or for violation of any law or any rule of the university, the regents may suspend the charter or any of the rights and privileges of such institution.

§313. Discrimination in admission of applicants to educational institutions

(2) Definitions. (a) Educational institution means any educational institution of post-secondary grade subject to the visitation, examination or inspection by the state board of regents or the state commissioner of education and any business or trade school in the state.

(3) Unfair educational practices. It shall be an unfair educational practice for an educational institution after September fifteenth, nineteen hundred forty-eight:

(a) To exclude or limit or otherwise discriminate against any person or persons seeking admission as students to such institution or to any educational program or course operated or provided by such institution because of race, religion, creed, sex, color, marital status or national origin; except that nothing in this section shall be deemed to affect, in any way, the right of a religious or denominational educational institution to select its students exclusively or primarily from members of such religion or denomination or from giving preference in such selection to such members or to make such selection of its students as is calculated by such institution to promote the religious principles for which it is established or maintained. Nothing herein contained shall impair or abridge the right of an independent institution, which establishes or maintains a policy of educating persons of one-sex exclusively, to admit students of only one sex.

(5) Procedure. (b) Where the commissioner has reason to believe that an applicant or applicants have been discriminated against, except that preferential selection by religious or denominational institutions of students of their own religion or denomination shall not be considered an act of discrimination, he may initiate an investigation on his own motion.

(8) The commissioner shall include in his annual report to the legislature (1) a resume of the nature and substance of the cases disposed of through public hearings, and (2) recommendations for further action to eliminate discrimination in education if such is needed.

§5001. Private schools

3. Application, renewal application and fees. Application and renewal application for a license as a private school, together with financial and statistical reports required by the commissioner shall be filed on forms prescribed and provided by the department.

§5003. Standards for licensed private schools and registered private business schools

2. Expiration of license or registration. a. A license or registration issued pursuant to the provisions of this article shall be valid for a period of two years.

b. An application for renewal of any license or registration shall be submitted at least sixty days prior to the expiration date of the current authorization to operate accompanied by the statutory fee and a statistical and financial report.

c. When timely application for renewal has been made, the existing license or registration shall be deemed to be automatically extended until sixty days after the applicant has been notified that the application for renewal has been granted or denied by the commissioner.

Statement of the Case

This proceeding was commenced in Supreme Court, Albany County, State of New York, on February 17, 1981, and seeks annulment of a determination by respondents denying the Richard I schools' applications for renewal of licensure, and a declaratory judgment that respondents lacked authority to require the Richard I schools to submit statistical data concerning its students.

Petitioners, Richard I schools, hereinafter denominated "schools", are private schools operated by business corporations which are licensed by the New York State Education Department under the provisions of Article 101 of the Education Law (Education Law §§5001-5004) and which offer postsecondary education in cosmetology. Petitioners Voilet Curry and Dolores Ector, hereinafter denominated "students", were students enrolled in petitioners' "schools". Respondents are Gordon M. Ambach, as Commissioner of Education of the State of New York, and the New York State Education Department.

Licenses issued to occupational schools at the time this litigation began were valid for a one-year period. Presently such licenses are valid for periods of two years. Occupational schools are required to obtain new licenses by applying for renewal prior to the termination of each successive license. The application forms require schools to report to the Education Department information relating to various aspects of the school's operations (Education Law §5003, subd. 2). Statistics relating to student placement and retention are examples of the type of information which has been customarily required.

In 1979, respondents revised the forms on which schools were required to report data to the Department. The revised forms, entitled Occupational and Educational Data System (OEDS), require additional categories of statistical information, including information concerning gender, race, and national origin of students in attendance, and information concerning any economic disadvantages or handicapping conditions which might affect students.

All schools subject to the licensing requirements were asked to supply this information. Respondents conducted a number of meetings both with schools and with associations representing schools affected by the new reporting requirements, to explain the basis for the requirements and to assist schools in their efforts to compile and report the data required. Included with the new forms sent to schools due to reapply for licensure were extensive instructions explaining the categories of statistical information to be reported and methods suggested by respondents for obtaining the information sought. The information was to be based upon observation by faculty, and no student could be personally identified (Appendix herein pg. 1).

The Richard I schools refused to submit the additional data or even to complete and submit the new OEDS forms. Although the schools did supply certain information concerning student retention and placement data on the forms in use before 1979, they have repeatedly refused to submit any statistical information concerning the gender or racial and ethnic composition of the student population, or any information concerning possible handicapping conditions or economic disadvantages affecting any students in their schools.

Although the reporting requirements were first implemented in 1979, the Richard I schools were allowed additional time to submit the information. All schools were advised that failure to submit the requested data might result in the denial of their applications for license renewal.

In December of 1980 the schools were given notice that their refusal to submit the requested information constituted a failure to complete the application process necessary for their new licenses. The prior licenses expired 60 days from the date of the notice, as provided in Education Law section 5003, subdivision 2, paragraph 3.

However the licenses were continued in effect during the early stages of the litigation, and on February 22, 1982, the State Education Department amended its regulations, as explained more fully in Point III of the argument. New licenses have been issued to the Richard I schools, and are now in effect. The Department now requires the schools to compile the disputed data and to report data on the gender of enrolled and graduating students. So much of this petition as claims a denial of licensure and of the right to operate schools is academic.

POINT I

State law authorizes respondents to require private schools to submit statistical data concerning students.

The decision and judgment which petitioners seek to review in this Court is grounded upon an interpretation of the laws of the State of New York. Both appellate courts unanimously concluded that respondents acted within their scope of authority under State law, did not proceed in a manner which was arbitrary or capricious or in violation of any State law, and did not deprive petitioner schools or students of any property right under State law.

Conspicuous by its omission from the petition to this Court is any mention of the fact that the statistical information requested from petitioners' schools could not be used to personally identify any of the students in the schools and consequently could not violate any personal privacy right of any student. The information which the schools were asked to supply, and which they refused to supply, was statistical information related to the general composition of the student body.

The New York State Education Department has been granted broad authority by the State Legislature to regulate the operation of licensed private trade schools. Such schools are institutions of post-secondary education and are part of The University of the State of New York (Education Law §214). Section 215 of the Education Law authorizes the Board of Regents and the Commissioner to inspect any institution in the University and to require the submission of such reports as they may need to discharge their respective duties.

The provisions of Article 101 of the Education Law (Education Law §§5001 through 5004), confer on the Education Department exclusive jurisdiction to regulate private schools such as the schools in this proceeding.

Section 5003 of that law requires a school submitting an application for renewal of license or registration to include with the application submitted "... the statutory fee and the annual statistical and financial report". This statutory provision was implemented by the Commissioner in a regulation promulgated in the Official Computation of the Codes, Rules and Regulations of the State of New York (8 NYCRR §126.10[b]).

The provisions of section 313 of the Education Law provide that no educational institution of post-secondary grade regulated by the Board of Regents or the Commissioner of Education may discriminate against applicants on the basis of race, color, sex, creed or national origin. The Commissioner of Education has enforcement responsibilities under these statutory provisions which parallel enforcement procedures available to the State's Division of Human Rights (*New York University v. New York State Division of Human Rights*, 84 Misc. 2d 702).

The Appellate Division and the Court of Appeals of the State of New York unanimously concluded that respondents had ample statutory authority to compel the schools to submit the statistical information requested. Both Courts concluded that the submission of such information to respondents was in furtherance of the Legislative purposes enunciated in section 313 of the Education Law, which require the Commissioner of Education to submit annual reports to the Legislature detailing recommendations for further action to eliminate discrimination in education.

The Appellate Courts concluded that as well as being in legitimate furtherance of a State purpose, the collection of the data requested from the schools was also an obligation imposed upon respondents as a result of the fact that Federal financial assistance benefits students in the State's vocational schools.

POINT II

Student petitioners' privacy rights were not violated.

Petitioners' attempt to justify review by this Court on the basis of a denial of privacy rights is clearly insubstantial. No student is named in or personally identifiable from the general statistical information at issue. No student is required to submit personal data, and the collection of the general data is based upon observations by the school faculty and administrators. There is no allegation that the data is used in any way to affect the attendance or standing or any other right or privilege of any student. This case involves nothing more than the compilation of general statistical data to enable the State to assess the overall racial and ethnic composition of the student bodies in its occupation schools.

Although the schools have articulated complaints concerning what they feel are violations of the student's right of privacy, there is no citation to any Federal Court decision which holds that the collection of data in the manner suggested by respondents in this proceeding constitutes a violation of the privacy rights of any student attending an educational institution.

Federal authorities charged with enforcement of Federal civil rights laws do not consider the compilation of statistical data relating to race, sex, creed or national origin or handicapping condition to constitute an unwarranted invasion of privacy or confidentiality. 34 CFR section 106(c) specifically provides that considerations of privacy or confidentiality will not bar Federal authorities from reviewing or evaluating such statistical data maintained by recipients of Federal funds. Regulations promulgated by agencies charged

with enforcement of the Federal anti-discrimination statutes are entitled to great weight (*Trafficante v. Metropolitan Life Insurance Company*, 409 US 205, 210 [1972]; *Griggs v. Duke Power Company*, 401 US 424, 433-434 [1971]). Federal forums presented with claims that the compilation or collection of such data constitute an unwarranted invasion of privacy have concluded that such data may be collected, and that the privacy rights of those to whom the information relates are not violated thereby (*United States v. New Hampshire*, 539 F2d 277 [First Circuit Court of Appeals [1976]; *Caulfield v. Board of Education*, 449 F. Supp. 1203 [1978], 583 F2d 605 [US Court of Appeals 2nd Circuit (1978)], 486 F. Supp. 862 [1979], 632 F2d 999 [2d Circuit, (1980)], [See particularly 583 F2d 605, pages 610-612]).

Respondents must also take issue with the schools' assertion that they have standing to raise the privacy rights of their students in this proceeding. If any privacy rights are involved in this matter, and respondents contend otherwise, the rights are purely personal to the students. A litigant may assert only his own constitutional rights (*McGovern v. Maryland*, 366 U.S. 420 [1957]), and may not assert the rights of others vicariously (*Broadrick v. Oklahoma*, 413 U.S. 60 [1973]; *California Bankers Association v. Schultz*, 416 U.S. 21 [1974]).

POINT III

The due process claim is moot.

The schools' contention that respondents' denial of their license renewal applications without an evidentiary hearing violates due process is moot. The schools have never ceased operating and therefore have never been deprived of any property right to continue in business.

In the early stages of the litigation, the schools continued in operation by virtue of injunctive relief granted them by the Justice presiding at Special Term of the New York Supreme Court. In February of 1982, in response to the New York Supreme Court's declaration that respondents lacked statutory authority to require schools to submit the disputed data, respondents amended the regulations relating to the reporting requirements. The amendments limited the data required to be reported to statistics concerning enrollment and graduation of students by gender and the numbers of students receiving Federal and State financial assistance. Schools benefitting from Federal financial assistance are required to compile civil rights related data where required by Federal statute.

After the effective date of the amendments, the schools submitted license renewal applications together with the statistical data required under the amended regulations. New licenses were issued and are currently in effect.

Since the schools' due process contention is based upon denial of a hearing in connection with the denial of the application for new licenses, and since the new licenses have in fact been issued, this issue is now moot. Any further decision by this Court on the due process issue would constitute an advisory opinion (*Amalgamated Association v. Wisconsin Employment Relations Board,* 640 US 416 [1951]; *Berry v. Davis,* 242 US 468 [1917]; *Williams v. Simons,* 355 US 49, 57-58). Since this issue has been rendered moot, this Court should not grant the petition for writ of certiorari to review the matter.

POINT IV

The State courts properly concluded that respondents were not required to afford the schools an opportunity for a hearing.

The schools' argument that they should have been afforded a hearing prior to respondents' action denying their applications for renewal of licensure is without merit.

There is a clear distinction between cases in which the State moves to terminate a right to liberty or property which it has conferred and which the holder reasonably assumes to be a continuing right, and cases which involve a newly granted right or the renewal of a right which was granted only for a stated period of time. The former cases involve action of a disciplinary nature, and a due process hearing is required (*Perry v. Sinderman*, 408 U.S. 593 [1972]; *Morrisey v. Brewer*, 408 U.S. 471 [1972]; *Goss v. Lopez*, 419 U.S. 565 [1975]). The latter type of case involves failure to qualify for a right or to meet the standards for its continued exercise, without any allegation of misconduct or any aura of discipline or opprobrium. In these cases no such due process hearing is required (*Board of Regents v. Roth*, 408 U.S. 564 [1972]; *Matthews v. Eldridge*, 424 U.S. 319 [1976]; *Leis v. Flynt*, 439 U.S. 438, 58 L. Ed. 2d 717 [1979]; *Spady v. Mount Vernon Housing Authority*, 34 NY2d 573, 310 N.E. 2d 542, cert den 419 U.S. 983 [1974]).

The State courts correctly determined that in the circumstances presented by this case, no hearing in advance of notification that the license had expired was necessary since the determination was a denial of a renewal application and not the revocation of an existing license (*Matter of Hirsch v. Hastings*, 70 AD2d 1052; *Matter of Wager v. State Liquor Authority*, 4 NY2d 465,

468). The schools did not have a permanent right to operate. The right that they were granted under a State law is a license limited by its express terms and by Education Law section 5003, subdivision 2, to a specified period of time. The denial of the applications for renewal was not a disciplinary action, but resulted solely from the refusal of the schools to submit the materials required to complete the application. Under those circumstances, no formal due process hearing in the nature of a trial was required. The administrative procedure and record provided a full opportunity for the schools to present their position, and a full record for judicial review.

It is also clear from the brief submitted by petitioners in support of their application for a writ that the issues they wish to present at a hearing were not appropriate for a hearing. On page 18 of the petition herein, the schools articulate what they propose to present at the hearing they request. It reads as follows:

> "However respondents denied the request for a hearing, thereby preventing the petitioners from articulating the *moral and practical objections they had to the requirements.* Certainly it would have been an appropriate fact to establish at such a hearing *that petitioners were morally and practically unable, in good faith or with any degree of accuracy, to comply with the directive of the respondents regarding the OEDS forms and the personal data of their students.*" (emphasis supplied).

The only facts which were relevant to the decision herein were that respondents required the schools to submit statistical information, and the schools refused to supply it. Petitioners stated that they were denied a hearing at which they could have raised objections to the reporting requirements. However, the imposition of the reporting

requirement raises questions of law, not questions of fact as to which a hearing might be required. The authority to impose the requirement was reviewable in the State courts, which concluded that respondents have such authority. Certainly no evidentiary hearing is required, even where property rights are at stake, solely for the purpose of arguing the wisdom, efficacy or legality of a requirement imposed by statute or by regulation. A question of compliance or non-compliance with the requirement might have required a hearing, if the underlying issue had been the termination of a property right rather than the denial of a license application. But in this instance the schools admit that they did not comply with the licensing requirement. There is no factual dispute, and hence no issue to be determined by a hearing, even if a hearing were otherwise required by due process of law.

The decision of the New York court below is based upon an interpretation of New York State laws relating to the operation of private trade schools, and not upon an interpretation of Federal constitutional or statutory law. Petitioners have failed to establish any violation of a Federal right.

POINT V

Issues sought to be raised in this Court were not presented to or passed upon by the State courts.

In sections 'B' and 'C' of the argument in the petition, petitioners attempt to raise issues relating to alleged constitutional violations of rights of the schools and the students. Section B claims that constitutional due process rights were violated by the manner in which the schools were advised to collect the data, and section C claims that constitutional due process rights were

violated due to the alleged absence of controls relating to the statistical data collection system. While claims related to the same factual underpinnings were raised in the State courts, it is clear from the record of the proceeding in those courts that they were not presented as questions of Federal constitutional or statutory law. A review of the decisions of the State appellate courts in petitioners' appendix demonstrates that the claims presented in the State courts were framed in terms of claimed violations of State laws and regulation, and were not presented as substantial Federal statutory or constitutional questions.

This Court has often held that a petitioner seeking favorable action on a petition for a writ of certiorari to a State court bears the burden of demonstrating that the Federal questions sought to be raised were squarely presented to and passed upon by the State's highest courts (*Webb v. Webb*, 101 Supreme Court 1889, 451 US 493, 68 Law edition 2d 392, 396-400 [1981]). Failure to properly present a substantial Federal question in the State courts warrants denial of the petition for a writ of certiorari *Webb, supra*, 451 U.S. pgs. 501-502.

In the brief submitted in the schools' appeal to the Court of Appeals of the State of New York, three points were raised. One of them dealt with the schools' claim that they should have been afforded a hearing prior to respondents' denial of the license renewal application. That contention was decided on the ground that the school did not have a property right under State law to which due process protection attached. The other two points raised read as follows:

> "Point 1. Respondents' actions in requiring completion of the OEDS forms and directing school closure for failure to complete the forms were illegal and beyond any statutory or regulatory authority."

> "Point 3. Respondents' actions in requiring completion of the OEDS forms and use of the observational techniques were arbitrary, irrational and unduly intrusive."

These are purely questions of State law and involve no Federal constitutional or statutory considerations.

The Appellate Division decision, which was adopted by the Court of Appeals in its unanimous affirmance, dealt with Point I of the schools' arguments by analyzing State law and regulations relating to respondents' authority to require private schools to submit reports in connection with their license renewal applications, and respondents' affirmative statutory obligations to evaluate and make recommendations to the State Legislature concerning discrimination in the educational system of the State. The Court found this State statutory authority a sufficient basis for respondents to require the schools to submit the statistical information sought in connection with their license renewal applications.

The Court also analyzed the question whether respondents were required under State law to promulgate an additional regulation before the schools could be called upon to submit the statistical information. The Appellate Division based its conclusion that no such regulation was required upon an analysis of the State's Administrative Procedures Act, as interpreted by the New York Court of Appeals (*Matter of Organization to Assure Services for Exceptional Students v. Ambach*, 56 NY 2d 518; *Matter of Rubin v. Campbell*, 48 NY 2d 805). (appendix to petition pages A-7 and A-8).

With respect to the issue discussed in point 3 in petitioners' brief to the Court of Appeals, the appellate Courts both concluded that the schools' complaints were

not warranted, in that the complaints about the manner in which the data was to be collected were based upon a misunderstanding of respondents' suggestions as to the methods to be used, and that the claim that the duty imposed upon them was unduly onerous was totally lacking in merit.

Although Federal regulations relating to respondents' obligation to monitor and evaluate schools whose students received Federal financial assistance were referred to in the Appellate Division decision, they were mentioned merely as an additional reason why the schools should have collected and submitted the statistical information sought. As the State courts found, State law provides a legitimate basis for the data collection requirements, and thus the decision sought to be reviewed herein rests upon an independent and adequate ground under State law.

In the Statement of the Case in the petition there is claim that a Federal question was presented to the State Courts and that such question is contained in paragraphs numbers 16-34 of the petition in the New York Supreme Court. Paragraph 34 does indeed broadly allege that respondents' actions violated petitioners' constitutional rights. However, that claim was not seriously pressed by petitioners, and the total absence of any reference to Federal statutory or constitutional issues in the appellate court decisions reinforces respondents' contention that no Federal question was presented to or passed upon by New York State's appellate courts. The mere conclusory assertion of a violation of constitutional rights without more should not be deemed sufficient reason by this Court to grant a petition for a writ (*Street v. New York*, 394 U.S. 576, 582; *Chicago I. and L.R. Company v. McGuire*, 196 U.S. 128, 131-133; *Bailey v. Anderson*, 326 U.S. 203, 206-207; *Fuller v. Oregon*, 417 U.S. 40).

Furthermore, there must be some affirmative showing in the record that a Federal question was presented to the State Court and that a decision on such question was necessary to a determination of the case. Where this is not clearly indicated, especially because of the presence of an adequate nonfederal ground, jurisdiction should be declined (*Lynch v. New York, ex rel. Pierson*, 293 U.S. 52, 54-55; *Adams v. Russell*, 229 U.S. 353, 358; *Woods v. Nierstheimer*, 328 U.S. 211; *Phyle v. Duffy*, 334 U.S. 431).

Respondents submit that not only was there no Federal question presented to the State courts, but that the State courts' decision of the cause on State law grounds demonstrates that if any Federal question was arguably raised, a decision on that question was not necessary to a determination of the cause. Review by this Court should be declined (*Wood v. Chesborough*, 228 US 672, 676-89; *West Chicago State Railway Company v. Illinois Ex-rel Chicago*, 201 US 506, 519-20).

POINT VI

The petition does not raise any issue which would justify the issuance of a writ of certiorari.

United States Supreme Court Rule 17, 28 U.S.C.A. sets forth additional criteria considered by this Court in exercising its discretion whether or not to grant a petition for a writ of certiorari. Respondents submit that the case sought to be reviewed herein does not satisfy any of the criteria in Rule 17 and presents no question of equivalent importance which might warrant review by this Court.

Petitioners do not claim that the decision of the New York Court of Appeals is in conflict with that of a Federal Court of Appeals, or that New York has decided

a Federal question in a way which conflicts with a decision of another State court of last resort or of a Federal Court of Appeals. There is no showing that the New York Court of Appeals has decided an important question of Federal law which should be reviewed by this Court.

Under this Court's standards the lack of any substantial Federal question should result in the denial of the petition herein.

Conclusion

For these reasons, the petition for a writ of certiorari should be denied.

Dated: June 12, 1984.

Respectfully submitted,

ROBERT D. STONE
Counsel and Deputy Commissioner for Legal Affairs
State Education Building
Albany, New York 12234
(518) 474-8932

FREDERICK W. BURGESS
DONALD O. MESERVE
Of Counsel

APPENDIX

Occupational Education Data System (OEDS) Instructions

[55.] OCCUPATIONAL EDUCATION DATA SYSTEM

Specific Instructions

OEDS-7. Enrollment in Licensed Private Schools and Registered Private Business Schools During the 1977-78 Reporting Period: July 1, 1977 through June 30, 1978

Section I—Enrollments by Individual Program

Section I requests information on the number of students enrolled in all programs in this school that are approved by the State Education Department. The number of students in each program should be reported according to the Occupational program titles listed in this section that most closely correspond to their major *program* of study. Students should be reported in one program area only. Do not duplicate enrollment data by reporting the same students in more than one program area. The only *exception* to this direction is students who completed one program during the reporting period and subsequently enrolled in another program during this same reporting period.

Please make sure to identify students according to their major program of study and not according to specific courses that they may be enrolled in.

Reporting Period—All students enrolled in this school in Department approved programs during the period of July 1, 1977 to June 30, 1978 should be included in this report.

Appendix—Occupational Education Data System (OEDS) Instructions.

PLEASE NOTE: STUDENTS ARE CONSIDERED TO BE ENROLLED ONCE THEY HAVE COMMENCED INSTRUCTION

For each of the programs operated by this school (as defined above), students must be reported by the following classifications:

Sex: Male, female

Full-time, Part-time: Students who are considered by this school to be attending an occupational program on a full-time basis should be reported according to sex in columns 1 and 2. All students who are considered by this school to be attending an occupational program on less than a full-time basis should be reported according to sex in columns 3 and 4.

Disadvantagement, Handicapping Condition: In column 5, indicate the number of students reported in columns 1-4 that have academic and/or economic disadvantagements that markedly interferes with their ability to successfully complete their occupational program at this school. Academic disadvantages are defined as a lack of sufficient reading, writing or mathematical skills. Economic disadvantagements which may be considered are (1) unemployment, (2) receipt of public assistance (welfare) under federal state or local programs, (3) institutionalization or State guardianship, (4) family income below established poverty level criteria, or (5) Student Financial Aid Programs (i.e. BEOG, SEOG, TAP, Student Loans).

Appendix—Occupational Education Data System (OEDS) Instructions.

In column 6, indicate the number of students reported in columns 1-4 that have handicapping conditions (other than academic or economic disadvantagements) that markedly interferes with their ability to successfully complete their occupational program. Handicapping [56.] conditions which may be considered are mental retardation, hearing impairments and deafness, speech impairment, visual impairment and blindness, serious emotional disturbances, orthopedic impairments, and other serious health impairments.

Students who have both an academic or economic disadvantagement *and* a handicapping condition should be *reported only once* in the handicapped category.

Section II—Number of Students Enrolled with Limited English-Speaking Ability (LESA)

Of the *total* number of students reported in Section I, columns 1-4, for all programs, indicate the number by sex, whose native tongue is a language other than English or who come from environments where a language other than English is dominant and because of either of these reasons have difficulties speaking and understanding instructions in the English language. Report students as "LESA" only if their language impairment is severe enough for this school to provide special assistance or a modified program in order for the students to successfully complete the program.

Appendix—Occupational Education Data System (OEDS) Instructions.

Section III—Racial/Ethnic Composition of Students Enrolled

Of the total number of students reported in Section I, columns 1-4, for all programs, indicate the number of students identified as belonging to each of the racial/ethnic classifications defined below:

American Indian or Alaskan Native—A person having origins in any of the original peoples of North America.

Black, not of Hispanic Origin—A person having origins in any of the black racial groups.

Asian or Pacific Islander—A person having origins in any of the original people of the Far East, Southeast Asia, or the Pacific Islands. This area includes, for example, China, Japan, Korea, the Phillipine Islands and Samoa.

Hispanic—A person of Mexican, Puerto Rican, Cuban, Central or South American, or other Spanish culture or origin, regardless of race.

White, not of Hispanic Origin—A person having origins in any of the original peoples of Europe, North Africa, the Middle East, or the Indian subcontinent.

Schools do not have to require students to specify their race or ethnic background and/or maintain this information as part of the student's permanent record. Data to be reported here could be based on the observations of personnel involved in the registration

process at the school or personnel having regular direct contact with the students (i.e. teaching staff, registrar etc.).

If there are any questions regarding the definitions or the instructions for completing any of Sections I, II or III of OEDS-7 please contact Charles DeVoe of the Bureau of Educational Data Systems at either of the following phone numbers 518: 474-3768 or 474-8913. Please provide the name of the person completing this form in the space provided on the cover page of the form and make sure that a file copy of the form is retained by this school.

RICHARD I SCH OF BTY CULTURE

314 WALL STREET

KINGSTON NY 12401

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Summary Data on Students Complet
Licensed Private Schools and
During the 1978
(July 1, 197

Section II. Program Completers/Leavers with Limited English

A. Program Completers Male

Female

B. Program Leavers Male

Female

Section III. Racial/Ethnic Composition of Program Completers/

A. Program Completers

Number of Program
Ethnic Classificat

American Indian or Alaskan Native	Bl Hi

B. Program Leavers

Number of Program
Ethnic Classificat

American Indian or Alaskan Native	Bl Hi

Name of Perso
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the State of New York
CATION DEPARTMENT
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ew York 12234

OEDS Reporting Form

UCATION DATA SYSTEM
EDS-8

ng or Leaving Occupational Programs at
egistered Private Business Schools
79 Reporting Period
- June 30, 1979

Proficiency (LEP)

Leavers

Completers Identified as Belonging to the Following Racial/
ions:

ack, not of panic Origin	Asian or Pacific Islander	Hispanic	White, not of Hispanic Origin

Leavers Identified as Belonging to the Following Racial/
ions:

ck, not of panic Origin	Asian or Pacific Islander	Hispanic	White, not of Hispanic Origin

Completing Sections
of OEDS-8

In The

Supreme Court of the United States

October Term, 1983

No. 83 - 1847

RICHARD I, INC., d/b/a RICHARD I SCHOOL OF BEAUTY CULTURE, EJRY, INC., d/b/a RICHARD I BEAUTY SCHOOL, VIOLET CURRY and DOLORES ECTOR,

Petitioners,

-against-

GORDON AMBACH, as Commissioner of Education of the State of New York, and the Education Department of the State of New York,

Respondents.

PETITIONERS' REPLY TO BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI

Cornelius D. Murray, Esq.
Attorney for Petitioners
O'CONNELL AND ARONOWITZ, P.C.
(Peter L. Danziger and
Thomas F. Gleason Of Counsel)
100 State Street
Albany, New York 12207
(518) 462-5601

Dated: July, 1984

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PETITIONERS' REPLY TO BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI

Petitioners submit the following Brief in reply to the Brief of the Respondents which was submitted in opposition to the Petitioners' Petition for Certiorari.

JURISDICTION

The Petition contains a typographical error and jurisdiction of this Court is conferred under 28 U.S.C. §1257 subsection (3) rather than subsection (2).

POINT I

THE PETITION PRESENTS SUBSTANTIAL AND CONCRETE ISSUES

At the outset, Petitioners wish to correct the assertion by Respondents that the instant Petition for Certiorari is academic insofar as it pertains to licensure of Petitioners' schools and their right to operate. In this case important privacy rights were mandated by the State to be invaded by a covert and speculative data gathering process, and as a result of Petitioners' refusal on grounds of moral conviction to engage in this process a severe and unconstitutional sanction was visited upon them.

It is true, as Respondents note, that the requirement for submission of the challenged portions of the OEDS forms was dropped by Respondents and that subsequent to the license year in issue, Petitioners' schools were issued licenses to operate. However, the subsequent issuance of licenses by no means cures the impact of the wrongful failure to renew the licenses in 1980, since Petitioners now may be deemed to have been operating unlicensed institutions with concomitant reputational harm and possible harm to students whose financial and license circumstances are subject to change depending on their having attended a licensed institution. Such liberty and property interests, cf. *Board of Regents of State Colleges v. Roth*, 408 U.S. 564, are obviously substantial and directly affected by the granting or denial of the instant Petition. Moreover, though the Petitioners' motivation to pursue this Petition certainly involves a matter of principle, the practical impact of the decision below is an extremely important factor in the Petitioner's application for the Writ of Certiorari.

POINT II

PETITIONERS WERE CONSTITUTIONALLY ENTITLED TO A HEARING

Although Petitioners' schools lost their licenses as a result of a refusal to renew them, rather than by a revocation, this in context is a distinction without a difference. Petitioners wish to correct the impression sought to be conveyed, in Respondents' Statement of the Case, that the OEDS forms were part of the statistical information required in the license application process. The OEDS forms were never part of the license application, and there is nothing in the record below to indicate that the OEDS forms were such a part of that license application process.*

The relevance of this point is that Petitioners' schools were not denied renewal licenses as a result of a technical omission in the license application. Instead, as noted in the Petition, the failure to renew was a punitive sanction sought to be invoked by Respondents as a result of Petitioners' failure to accede to what they believed was an unreasonable, illegal, and unconstitutional demand for information. Thus, in context, the failure to renew the licenses was a *de facto* revocation which raised a due process requirement of a hearing. *Duplex Co. v. Deering*, 254 U.S. 443, 465; *Truax v. Corrigan*, 257 U.S. 312.

Moreover, Respondents' contention in Point IV of its Brief in Opposition, that the failure to renew Petitioners' license posed no due process implications,

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* It also is untrue, contrary to the assertion on page 16 of the Respondents' Brief, that Petitioners ever have admitted they failed to comply with any licensing requirement. Petitioners have made no such admission.

is but another example of the form over substance due process analysis soundly rejected in *Board of Regents of State Colleges* v. *Roth,* 408 U.S. 564, 571 *supra.* As noted in *Roth,* it is the nature of the interest affected which is critical on a due process analysis, and here the interest was the very right of the schools to operate.

It was for this reason that Petitioners so adamantly requested a hearing. The Petitioner schools found themselves unable to comply with the departmental directive regarding OEDS, and this fact clearly was susceptible of being established at a hearing. Contrary to the Respondents' argument, Petitioners' ability, as distinguished from their duty, to comply with the OEDS directive presented a critical issue of fact and not one of law.

POINT III

RESPONDENTS CANNOT CURE THE PRIVACY VIOLATIONS INHERENT IN THE OEDS SYSTEM MERELY BECAUSE SYSTEM DATA ON PERSONAL CHARACTERISTICS OF PARTICULAR STUDENTS WAS NOT MAINTAINED

In Point II of Respondents' Brief in Opposition to the Petition, Respondents claim that there was no denial of privacy rights merely because no individualized data was maintained for students regarding the personal characteristics that must be reported under the OEDS. This argument totally ignores Petitioners' objection to the process of gathering the data itself and that in that process individualized characteristics of particular students had, of necessity, to be identified.

In this regard it is noteworthy that Respondents say there is a "conspicuous" failure by Petitioners to mention that the statistical information was not used to personally identify any of the students in

Petitioners' schools. However, Respondents' counsel obviously failed to read page 9 of the Petition where Petitioners stated that the data was maintained for the student body as a whole and that Respondents had used this as an argument that the personal privacy rights of the students were not at issue. Thus, this matter was directly addressed at page 9 of the Petition, and moreover the discussion at that point indicates that Respondents' contention that the privacy rights of Petitioners' students were not violated is unpersuasive.

It is the data gathering process under which Petitioners' schools were required to intrude and make speculative categorization decisions regarding particular students that results in the Petitioners' objections. Petitioners' students object to having such covert decisions made concerning them, and the Petitioner schools object to being forced to engage in the categorization process. From the very beginning of this legal controversy, Petitioners have steadfastly advocated that such a procedure violates fundamantal constitutional privacy interests and constitutes an unjustified government intrusion into the private educational system. At no point have Petitioners retreated from these arguments.

Respondents' contention in Point IV of the Brief in Opposition to the Petition that Petitioners fail to assert a constitutional basis for their argument that they had a right not to be involved in the speculative covert governmental data gathering process regarding the personal lives of their students, is totally without foundation. While it may be true that Respondents' constitutional arguments in this regard are in part derivative of a conclusion that the Petitioners' students' rights would be violated by OEDS, it is clear from Petitioners' Brief in the Court below that they were "unwilling to pry into the personal lives and privacy of their students" and that Petitioners were not "willing

to require school staff to engage in the kind of speculation and invasion of student's privacy rights required to complete the forms." *Olmstead v. United States,* 277 U.S. 438, was cited below as authority for the proposition that Petitioners' privacy rights were unconstitutionally invaded. Petitioner schools, in relying on *Pierce v. Society of Sisters,* 268 U.S. 510, also asserted the argument in their own right that the imposition of such duties on Petitioners overstepped government authority over private education.

It is true that State law arguments were made, indeed emphasized, in the Courts below in opposition to the OEDS, primarily based on the contention that such a system could not properly be implemented without resort to the procedures set forth in the State Administrative Procedure Act. However, it would have been jurisdictionally fatal for Petitioners not to have done so, as this Court has required that State courts be given an opportunity to construe State law in a manner that obviates the constitutional objections. *Webb v. Webb,* 451 U.S. 493, 500-501. In any event, even if it is assumed for purposes of argument that such federal basis for relief had not been clearly articulated, this Court has not applied a rule that federal issues that need be identified with "inflexible specificity", and, moreover, this Court retains jurisdiction to review plain error when necessary to prevent fundamental unfairness. *Vachon v. New Hampshire,* 414 U.S. 481, 480.

Respondents' argument that Petitioners have no standing to assert the privacy rights of their students totally ignores *Runyon v. McCrary,* 427 U.S. 160. Likewise unavailing is Respondents' argument that 34 CFR §106(c), insofar as it allows review of certain statistical data, somehow insulates the OEDS from any infirmity as a result of invasion of the privacy rights of Petitioners' students. Aside from the fact

that no such regulation could supersede Petitioners' constitutional rights, the fact remains that Petitioners' objections pertain to the data gathering process and the method by which Petitioners' schools are required to participate in the data gathering process. Respondents' argument, in essence, is that the data gained from covert and speculative observations of individual students may be sterilized simply by maintaining the wrongfully gathered data in a form which does not identify individual students. However, this hardly cures the invasion of privacy needed to obtain the data in the first place.

Likewise unavailing should be Respondents' objection that this court should not grant the instant Petition because an alternate State law ground for the decision below supposedly obviated the necessity for reaching Petitioners' constitutional arguments. See e.g. *Lynch v. New York ex rel Pierson*, 293 U.S. 52. The fact that a State law basis for a decision was relied upon by the court below cannot by any stretch of logic obviate the consideration of the constitutional issues if the argument of the Petitioners is that the application of the State law is itself the challenged constitutional infirmity. The *Lynch* rule applies only where the State court rationale is a truly independent and constitutionally unchallenged basis for the decision below.

Respondents also argue that Petitioners failed to preserve their argument now presented in sections B and C of the Petition, that Petitioners' due process rights were violated by the failure to afford Petitioner an opportunity or forum in which to challenge the rationality and intrusiveness of OEDS. However, the due process arguments clearly were made in Point I in Petitioners' Brief in the court below, where Petitioners relied by analogy on *John Doe d/b/a Capri Art Theater v. City of Buffalo*, 56 N.Y.2d 926. That

case held that a vague authorization to obtain "such other information as [the Administrator] shall require" was a constitutionally insufficient authorization in an area affecting First Amendment rights. As Petitioner argued below, where "open-ended discretionary power to collect information" and "fundamental privacy interests are involved," the rule should be no different than under constitutional analysis in the First Amendment area.

CONCLUSION

A Writ of Certiorari should be issued to review the opinion and judgment of the New York State Court of Appeals.

Respectfully submitted,

Cornelius D. Murray, Esq.
O'CONNELL & ARONOWITZ, P.C.
(Peter L. Danziger and
Thomas F. Gleason, Esqs.,
Of Counsel)
Attorneys for Petitioners
Office and P.O. Address
100 State Street
Albany, New York 12207
(518) 462-5601